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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,
Petitioners,

v.

ROBERT W. KELLEY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment permits a court of appeals to order a school desegregation plan, in effect since 1971, to be modified so that it reflects the current racial balance of the student population of a school system in the absence of any finding that the school system has engaged in unconstitutional activity within the past decade.

2. Whether the Fourteenth Amendment bars the modification of a school desegregation plan, found by a district court to be an effective means of achieving a unitary school system, merely because it orders that school attendance zones for certain grades be drawn with the goal of assuring that each racial group constitutes at least 15% of the student body of each school.

3. Whether the Fourteenth Amendment bars the modification of a school desegregation plan, found by a district court to be an effective means of achieving a unitary school system, merely because it does not include a requirement that children in grades K-4 be bused for the purpose of achieving greater racial balance in elementary schools.

4. Whether the Fourteenth Amendment and principles of equity permit a court of appeals to reject portions of a district court's school desegregation plan absent a holding that the plan as a whole is ineffective to achieve a unitary school system, or that the district court's findings of fact are clearly erroneous, or that the district court has abused its discretion in the fashioning of an equitable remedy.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 27, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals (reprinted in the Appendix at A. 1) is reported at ____ F. 2d ____ (6th Cir. 1982). The opinion of the Court of Appeals reviews three separate District

Court opinions, *Kelley* v. *Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.*, 479 F. Supp. 120 (M.D. Tenn. 1979) (reprinted in the Appendix at A. 38); *Kelley* v. *Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.*, 492 F. Supp. 167 (M.D. Tenn. 1980) (reprinted in the Appendix at A. 62); and *Kelley* v. *Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.*, 511 F. Supp. 1363 (M.D. Tenn. 1981) (reprinted in the Appendix at A. 128). The unpublished opinion of the Court of Appeals entered on August 19, 1981, granting a stay of implementation of the District Court's plan is reprinted in the Appendix at A. 155. The Chambers Opinion of Justice Stevens, entered on August 20, 1981, denying the Petitioners' request for relief from the stay is reprinted at A. 157. In addition, the 1971 opinion of the District Court (unpublished) is included at A. 159. The Court of Appeals' opinion affirming the 1971 order is reported as *Kelley* v. *Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.*, 463 F. 2d 732 (6th Cir. 1972), *cert. denied* 409 U.S. 1001 (1972) (reprinted at A. 179).

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on July 27, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides that:

> "No state shall . . . deny to any person within its jurisdiction equal protection under the laws."

STATEMENT OF THE CASE

This case concerns the power of a district court to modify requirements of a court-ordered desegregation plan in order to achieve the creation of a unitary school system. The schools of Davidson County, Tennessee ("County") have been operating since 1971 pursuant to a system-wide desegregation plan. In 1980, the United States District Court for the Middle District of Tennessee ("District Court"), which is overseeing the implementation of that plan, determined that "after nine years of zoning and busing to achieve a desegregated system and the changes that have taken place in the community and in the attitude manifested by the School Board . . . it is possible to reevaluate the efficacy of the remedy incorporated into the 1971 order." 492 F. Supp. at 189; A. 109. The District Court subsequently determined that the 1971 plan should be modified and ordered into effect a 1981 plan, which was based on extensive findings of fact supporting the District Court's decision to use both pupil assignment and educational components. A divided Court of Appeals, with Judge Celebrezze dissenting, rejected the 1981 plan. The Court of Appeals neither held the District Court's findings of fact clearly erroneous nor challenged the District Court's holding that its plan would be an effective means of achieving a unitary school system. Furthermore, the Court of Appeals ordered its own modification of the desegregation plan by requiring that school attendance zones be redrawn to approximate the current racial balance of the school system.

A. The Implementation Of The 1971 Desegregation Plan

In 1971, the District Court ordered into effect a desegregation plan for the County, which includes the City of Nashville and its environs, based upon this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971).

Kelley v. *Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.*, Civil Action Nos. 2094, 2956 (M.D. Tenn. 1971); A. 159.[1] The 1971 plan excluded schools located in the outer edges of the county[2] and ordered busing of school children in the remainder of the County's schools in order to achieve a minority student population in each school of 15%-35% (based upon a system-wide black student population of 25%). The 1971 plan did not require that the School Board implement any educational programs, either remedial or intercultural, nor did it require that kindergarten classes be included within the plan. Implementation of the 1971 plan was affirmed by the United States Court of Appeals for the Sixth Circuit. *Kelley* v. *Metropolitan County Board of Education, et al.*, 463 F. 2d 732 (6th Cir. 1972), *cert. denied*, 409 U.S. 1001 (1972); A. 179.

B. Review and Modification of the 1971 Desegregation Plan

In 1978, the case was reassigned to a newly appointed district judge, Thomas A. Wiseman, Jr. The next year, Judge Wiseman held that, because of changing conditions in the County, the 1971 plan required revision. 479 F. Supp. at 122-23; A. 43-44. He ordered the School Board to submit a new plan. In 1980 and 1981, the District Court held more than forty days of hearings and considered various plans.

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[1] The original complaint was filed in this case in 1955 by a class of black parents and students, seeking injunctive relief from state-mandated segregation existing in the school system of the City of Nashville, Tennessee. In 1960, another group of plaintiffs filed a similar action against the Davidson County, Tennessee school system. In 1963, these cases were consolidated upon the merger of the City and County governments.

[2] According to the District Court, to subject these distant schools to the bus transportation required by the plan would have flown in the face of "practical considerations, common sense, and judgment. . . ."; A. 169.

Of special significance during these hearings was the testimony offered by the plaintiffs of Dr. Hugh Scott. Dr. Scott, who has held academic positions at the City University of New York and Howard University and has served as Superintendent of the public schools in the District of Columbia, attacked several assumptions underlying the proposed School Board plan, which called for system-wide busing of students in all grades. As the District Court noted, "the black plaintiffs urge upon the Court *less* busing, *more* neighborhood characteristics to the assignment plan, and the permissibility of majority black schools." 492 F. Supp. at 184; A. 98. (Emphasis in original).

Based upon evidence introduced at the hearings, the District Court determined that the 1971 plan, which focused exclusively on pupil assignment and did not include any educational programs, should be modified to reflect the following findings: (i) parental contact with the teachers of young children is important to a young child's education and such contact "could only be fostered by having the schools in such a location that the parent could frequently visit the school, talk with teachers, become personally involved, and contribute services," 511 F. Supp. at 1367; A. 136, (ii) the requirement that the minority population in each school reflect the minority population of the school district as a whole had not provided the desired educational results, 492 F. Supp. at 190-91; A. 111-13,[3] (iii) public support for the school system had decreased, 492 F. Supp. at 189-90; A. 109-12, and (iv) information before the court "strongly suggest[ed] the necessity for educational components

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[3] The District Court also noted that "[p]laintiffs assert that to contend that a black child can receive a quality education only in a white majority classroom is blatantly racist and paternalistic." 492 F. Supp. at 184; A. 97-98.

both as an essential ingredient to the remedy and also as a reinforcement to parental perception of and *support for*, the system." 492 F. Supp. at 191; A. 113. (Emphasis in original).

The Court thus determined that a unitary school system could be best achieved by a lessened emphasis on busing and greater emphasis on the use of funds to promote remedial and cultural education. The District Court ordered that (i) the School Board devise school districts for grades K-4 "of a neighborhood character [while] maximizing the opportunities for integration," 492 F. Supp. at 192-93; A. 117, (ii) children in grades 5-8 be bused with the objective of attaining "at least 15 percent of either race in the minority of each middle school," 492 F. Supp. at 193; A. 117, and (iii) financial savings from decreased transportation of students be applied to the creation of magnet schools and other new educational programs. 492 F. Supp. at 195-96; A. 122-24.

C. The Provisions of the 1981 Desegregation Plan

In 1981, the District Court approved the plan submitted by the School Board as in compliance with the Court's specific guidelines. Pursuant to the District Court's order, the School Board designed a training program to ensure that faculty and staff throughout the school system are sensitive to the special needs of black children. In addition, the School Board plan divides the student population into three age groups:

1. *Grades K-4:* The 1981 plan contains school districts for children in grades K-4 that maximize integration without recourse to busing for the purpose of racial balance. The money saved by lowered transportation costs is to be used to fund special remedial classes for schools with a majority population of minority students and to hire more teachers in order to achieve better faculty/student ratios. The plan requires the implementation of an intercultural exchange program and the

development of intercultural experiences for those schools that will be predominantly of one race. 511 F. Supp. at 1368-72; A. 140-47; 492 F. Supp. at 196-97; A. 125-26.

2. *Grades 5-8:* The plan contemplates the creation of 24 schools serving grades 5-8. Consistent with the court order, 80% of the schools would contain a population composed of at least 15% from either race by 1984. The plan includes special educational programs for middle schools, the opening of a magnet school initially serving grades 7 and 8, and the creation of courses "directed toward the recognition of cultural diversity in a pluralistic society." 511 F. Supp. at 1368-72; A. 140-47.

3. *Grades 9-12:* The plan creates ten high school attendance zones, nine of which will fall within the 15% standard set by the District Court by 1984. Like younger students, high school students will participate in multicultural educational programs. The plan also contemplates the expansion of the academic magnet school to serve grades 7-12. Magnet schools have been found to be an effective means of furthering integration efforts. 492 F. Supp. at 195; A. 122-23; 511 F. Supp. at 1369-71, 1373; A. 142-44, 149-50. Finally, the plan adds to each high school an Afro-American Studies Program, which will educate students in black history. 492 F. Supp. at 196-97; A. 122-23; 511 F. Supp. at 1370-71; A. 144.

D. *The Court of Appeals Decision*

A divided Court of Appeals rejected the 1981 desegregation plan for three reasons.[4] First, the court ordered that the plan be modified so that school attendance zones are based on the cur-

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[4] The 1981 plan has never gone into effect. While an appeal was pending in the Sixth Circuit, that court stayed implementation of the plan; A. 155, and Justice Stevens sitting as Circuit Justice, denied an application from the School Board to vacate that stay. A. 157.

rent black population of the school system (32%). Second, the court reversed the desegregation plan for the middle and high schools because the District Court required only that the school system seek to achieve the goal that each racial group constitute 15% of each school. Third, the court held that the K-4 segment of the plan was constitutionally insufficient because the District Court failed to order the mandatory busing of young school children. A. 1-26.

In a vigorous dissent, Judge Celebrezze pointed to fatal flaws in the majority's reasoning. A. 26-37 First, the court misread *Swann* to mandate that a desegregation plan be based upon the ratio of black-to-white students in the County. By contrast, Judge Celebrezze read *Swann* only to hold "that the district court *may* adopt such a ratio as part of a desegregation remedy." A. 33-34 (Emphasis in original). Second, the court failed to recognize that a district court "may use its discretion to determine the proper scope of a busing plan in a desegregation remedy." A. 35. Third, and perhaps most importantly, Judge Celebrezze charged that the majority had not applied the proper standard of review to its scrutiny of the 1981 desegregation plan. Rather than determining whether the 1981 plan, considered as a whole, would be an effective means of achieving a unitary school system, the court simply rejected those portions of the plan with which it disagreed. In so doing, the court neither held that the district court had made erroneous findings of fact nor had abused its discretion in the selection of remedies. Judge Celebrezze concluded that the majority thus disregarded the standard established by this Court for review of district court remedial plans. A. 29-32, 35-36; *see, Dayton Board of Education* v. *Brinkman,* 443 U.S. 526, 534, n.8 (1979) (findings of fact); *Milliken* v. *Bradley,* 433 U.S. 267, 281 (1977) (abuse of discretion).

REASONS FOR GRANTING THE WRIT

I.

The Court Of Appeals Ignored The Precedent Of This Court By Ordering That The 1971 Plan Be Modified To Reflect The Current Racial Makeup Of The School Population

The 1971 plan required that attendance zones be drawn to achieve a black population of between 15%-35% in each school based upon a black student population of 25%. In 1982, the Court of Appeals ordered that the attendance zones be redrawn because the black student population of the system had become 32%. A. 9-11. The court's holding was plain error and clearly inconsistent with this Court's holding in *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424 (1976).

In *Spangler,* a desegregation plan was implemented in 1970 that contained no district in which minority students formed a majority of the population. By 1974, shifts in population resulted in several schools having a majority of minority students. Although these population changes were not attributed to any segregative actions of the school board, the district court ordered that school attendance zones be redrawn so that, once again, no school would have a majority of minority students.

This Court reversed. It held that once a system-wide desegregation order has been put into effect, a federal court has no authority to require that school attendance zones be updated to reflect the new racial makeup of the schools unless the change in the racial population of those schools is attributable to new acts of racial discrimination on the part of the school board. The fact that the school system may not have become fully unitary does not mandate a different result, for, as this Court stated, "having once implemented a racially neutral attendance

pattern in order to remedy the perceived constitutional violations . . . the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." 427 U.S. at 436-37. *Spangler* thus reiterated the principle that " '[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." ' *Id.*, at 434, *quoting Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971).

The Court of Appeals patently ignored the rule of *Spangler*. In 1971, a system-wide plan for desegregation of the County's student population was put into effect. In 1972, the District court ordered the School Board to take certain additional actions, including the purchase of school buses. Since that time, the School Board has never been found to have violated the constitution in the manner in which it implemented the 1971 plan.[3] The Court of Appeals' order that the 1971 plan must be altered to reflect changes in racial population accruing over the next decade thus "appears to comtemplate the 'substantive constitutional right [to a] particular degree of racial balance or mixing' which the Court in *Swann* expressly disapproved.' " *Pasadena City Board of Education* v. *Spangler*, 427 U.S. at 434, *quoting Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. at 24 (brackets in original).

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[3] The District Court made two findings concerning events since 1972. First, the District Court found that, despite the good faith efforts of the School Board, implementation of the 1971 plan "amounts to *de jure* segregation." 479 F. Supp. at 123; A. 45. By this, the District Court meant that the exclusion of outlying areas of the County by court order from the 1971 plan had affected population movements: "[I]t appears to me that the previous Court action . . . has contributed to resegregation by the mere existence of a sheltered area; it has encouraged resegregation; and to the extent that it has, this Court is of the opinion — I don't know whether there is any case law to support it — but that is *de jure* action rather than *de facto* action."

II.

The Court Of Appeals Erroneously Held That The 1971 Plan Could Not Be Modified To Require That School Attendance Zones Be Drawn With The Goal Of Assuring That Each Racial Group Constitutes At Least 15% Of The Student Body Of Each School

In approving the 1981 plan as applied to middle and high schools, the District Court sought to ensure that each race includes at least 15% of the student body in each school. The use of this figure was suggested to the District Court by the plaintiffs, *see,* 511 F. Supp. at 1368; A. 138-39; 492 F. Supp. at 193; A. 117-18, and resulted in the establishment of attendance zones that appear to increase integration in the County's secondary schools. The District Court's modification of the pupil assignment portion of the plan creates more integrated schools for secondary students, whether measured against the definition of "integration" used in either the 1971 or the 1981 plans.[6]

R. June 26, 1979 hearings, Volume III, p. 32. The District Court did not, therefore, find that School Board action was unconstitutional nor, in light of the concomitant finding of good faith, could it have. *See, Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 413 (1977).

Second, the District Court found that the School Board's implementation of a transfer program as it affected one high school conflicted with the "spirit" of the 1971 Plan and an order issued in 1979 but did not rise to action in contempt of court. 479 F. Supp. at 129; A. 56-57. The District Court did not purport to hold that the School Board's actions were unconstitutional nor did the Court of Appeals when it recited these facts. (A. 3-4).

[6] In 1979-80, the last year for which such figures appear in the record, 42% of the junior high schools and high schools operated pursuant to the 1971 plan contained black populations within 15%-35% and 73% contained at least 15% of their student body from either race. Exhibit 152. By contrast, implementation of the 1981 plan will

Despite the fact that the 1981 plan actually improves the integration of secondary schools, the Court of Appeals reversed the pupil assignment portion of the plan for middle and high schools merely because the District Court relied upon the 15% figure as a method of modifying the 1971 Plan. The Sixth Circuit attempted to justify its holding by relying on *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971). In *Swann,* this Court approved the use of a mathematical ratio reflecting the racial population of the school system as a permissible remedial method by which to measure the degree to which individual schools are segregated. *Swann* is inapposite to this case for two reasons. First, *Swann* dealt with the means by which an *initial* desegregation plan may be drawn and not with permissible modifications to an earlier plan. *Swann* is, therefore, no authority for the proposition that a modification to a desegregation plan that increases integration is constitutionally impermissible. Second, *Swann* merely held permissible the use of a fixed racial quota as the starting point for desegregation plans — it did not command the lower courts to use such a formula regardless of the facts of the particular case before them. *See, Winston-Salem/Forsythe County Board of Education* v. *Scott,* 404 U.S. 1221, 1227-29 (1971) (Burger, C.J., in chambers). This Court has repeatedly emphasized that there is no constitutional right to attend a school reflecting the racial composition of the student population.[7]

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result by 1984 in 52% of the middle and high schools having a black population within 15%-35%, and 83% of these schools having student populations of at least 15% from either race. Court Exhibit 268. Under either method of comparison, therefore, the 1981 Plan creates more integration in the secondary schools than does the 1971 Plan.

[7] *Milliken* v. *Bradley,* 433 U.S. 267, 280 (1977); *Pasadena City Bd. of Ed.* v. *Spangler,* 427 U.S. 424, 434 (1976); *Milliken* v. *Bradley,* 418 U.S. 717, 803 (1974) (Marshall, J. dissenting); *Milliken* v. *Bradley,* 418 U.S. 717, 740-41 (1974); *Keyes* v. *School District No. 1,* 413 U.S. 189, 244-48 (1973) (Powell, J., concurring in part and dissenting in part).

Moreover, and as Judge Celebrezze noted in dissent, *see,* A. 33, n.9, the Sixth Circuit's rigid insistence upon the use of mathematical ratios conflicts with a recent decision of the Eighth Circuit. In *Liddell* v. *Board of Education of the City of St. Louis,* 667 F. 2d 643, 649 (8th Cir. 1981), *cert. denied* 451 U. S. 902 (1981), the Court approved a desegregation plan that allowed the operation of schools with black populations of 30%-50% even though the school system as a whole was 76% black. The court, in analysis strikingly similar to the District Court in this case, approved the desegregation plan because "students remaining in the predominantly black schools . . . are not left completely untouched by the new system." 667 F. 2d at 649. The Eighth Circuit emphasized that students in largely one-race schools would benefit from magnet schools and alternative programs and that "the plan requires the Board of Education to spend a substantial portion of the $22 million desegregation budget to improve the quality of education in those schools that remain all black." *Id.* Thus, the Eighth Circuit approved a desegregation plan that would run directly afoul of the decision of the Sixth Circuit in this case.

III.

The Court Of Appeals Applied An Erroneous Legal Principle When It Rejected The District Court's Modification Of The 1971 Busing Decree

The Sixth Circuit rejected the implementation of the 1981 plan for grades K-4 because it read the opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education* as requiring busing to be part of every desegregation plan unless school boards are able to establish that such busing will risk the health of children or significantly impinge on the educational process. The Sixth Circuit's interpretation of *Swann,* as well as its application of the busing "exception," is inconsistent with the reasoning of that case and is in conflict with the decision of at least one other circuit.

In *Swann*, this Court was called upon to review a district court's determination that mandatory busing was necessary in order to dismantle effectively the prior unconstitutional school system. This Court, recognizing that "[n]o rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations," 402 U.S. at 29, held that mandatory busing falls within a district court's "power to provide equitable relief." *Id.*, at 30.

The Sixth Circuit stood *Swann* on its head by reading this Court's opinion as holding that busing must be part of every desegregation plan. Correctly read, *Swann* merely stands for the proposition that "bus transportation is one of the permissible techniques in effecting school desegregation." *Drummond* v. *Acree*, 409 U.S. 1228, 1231 (1972) (Powell, J., in chambers); *see, Valley* v. *Rapides Parish School Board*, 646 F. 2d 925, 939 (5th Cir. 1981), *cert. denied* 102 S. Ct. 1430 (1982). The *Swann* opinion emphasized that, because of the inherently local nature of the decision on the use of busing, there can be "[n]o rigid guidelines" governing the permissible uses of mandatory busing. 402 U.S. at 29.[8]

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[8] The Sixth Circuit also erred in its interpretation of the so-called *Swann* exception to mandatory busing. The *Swann* Court noted that a district court may exceed its equitable powers if it orders busing "when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." *Id.*, at 30-31. The Sixth Circuit erroneously understood the *Swann* Court's admonition that school busing will not be permitted in certain circumstances to mean that busing must be ordered unless those circumstances exist. And, even aside from this incorrect articulation of the applicable legal principle, the Court of Appeals misapplied the *Swann* exception when it rejected the District Court's decision not to employ busing despite the District Court's "findings concerning the educational effects of the remedy on young school children," and its conclusion that "the entire desegregation remedy might fail in the long run if very young children were included in the busing program." A. 34-35 (Celebrezze, J., dissenting); *see*, 492 F. Supp. at 189-93; A. 108-17.

The Sixth Circuit's interpretation of *Swann* conflicts with the Fifth Circuit's understanding of the use of mandatory busing. In *Stout* v. *Jefferson County Board of Education*, 537 F. 2d 800, 801-02 (5th Cir. 1976), the court of appeals upheld a district court's decision to exempt from busing certain schools because of their geographic location. Similarly, in *Lee* v. *Macon County Board of Education*, 616 F. 2d 805, 812 (5th Cir. 1980), the Fifth Circuit held that a court "may devise a constitutional plan . . . that omits some of the earlier grades from the busing program" so long, of course, as the district court's plan is sufficient to create a unitary school system.

In so holding, the Fifth Circuit not only acted in concert with the decision in *Swann;* it also followed the earlier ruling of the Sixth Circuit in this very case. In reviewing the 1971 plan for desegregation of the Davidson County Schools, the Sixth Circuit refused to upset the district court's decision to exclude from its busing plan schools in the outer edges of the County. *See, Kelley* v. *Metropolitan County Board of Education*, 463 F. 2d at 746; *id.*, at 750-51 (McCree, J., concurring); A. 209-10; 220-21.

The Sixth Circuit's contrary holding in this case — to the effect that a district court has very limited discretion not to order busing — thus conflicts with the precedent of this Court, the Sixth Circuit's own prior ruling in this case, and the principles governing equitable discretion articulated by the Fifth Circuit.

IV.

The Court Of Appeals Decision Ignored The Standards Of Review Articulated By This Court For Review Of A Desegregation Decree

A District Court always remains free to modify a school desegregation plan. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. at 437. The measure of a plan is whether it

constitutes an effective desegregation remedy. *See, Davis* v. *Board of School Commissioners of Mobile County,* 402 U.S. 33, 37 (1971); *see, Green* v. *County School Board of New Kent County,* 391 U.S. 430, 439 (1968). This Court has recognized that the creation of an appropriate remedy requires the weighing of many factual issues and the judicious exercise of equitable discretion: "[I]n school desegregation cases, '[t]here is no universal answer to complex problems . . ., there is obviously no one plan that will do the job in every case.' " *Milliken* v. *Bradley,* 433 U.S. 267, 287 (1977) (*quoting, Green* v. *County School Board of New Kent County,* 391 U.S. at 439). Accordingly, this Court has held that the selection of a remedy lies within a district court's equitable discretion. *See, Milliken* v. *Bradley,* 433 U.S. at 281; *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. at 25. Where the District Court supports its decision on the basis of findings of fact, they are binding on an appellate court unless held to be clearly erroneous. *Dayton Board of Education* v. *Brinkman,* 443 U. S. 526, 534, n. 8 (1979).

The Sixth Circuit ignored these well-settled legal principles. Instead, the Sixth Circuit rejected enforcement of the 1981 plan on grounds that were, as we have explained, legally insufficient and without regard to the effectiveness of the desegregation plan as a whole.[9] In so doing, it ignored the rulings of this Court

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[9] The Sixth Circuit noted in passing that the 1981 plan created some attendance zones composed largely of students of one race. Although a desegregation plan that fails to integrate fully a school system is unacceptable, the mere presence of some schools with a high percentage of blacks or whites does not invalidate a plan unless the makeup of those schools is a result of discriminatory actions, *see, Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. at 26, and the plan as a whole fails to achieve the maintenance of a unitary school system. *See, Davis* v. *Board of School Commissioners of Mobile County,* 402 U.S. at 33, 37 (1971). The Sixth Circuit completely failed to engage in the inquiry that would be necessary to support the conclusion that the 1981 plan is ineffective to remedy such desegregation.

and acted in direct conflict with the holdings of at least four circuits.[10]

As Judge Celebrezze's dissent demonstrates, A. 25, 31, 33, 36, the Court of Appeals would have affirmed implementation of the 1981 plan had it applied the proper standard of review. The District court found that the 1971 remedy significantly impinged upon the students' educational process; carried with it enormous economic, educational and sociological costs; had proven ineffective in eliminating the gap between black and white achievement scores; imposed an inherently disproportionate burden on black students, provided needless and harmful disruption to a young child's education; made it impossible for young black children to receive necessary community and parental support and involvement; and was proving counterproductive in achieving racial balance in each school.[11]

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[10] The following courts of appeals have held that the "abuse of discretion" standard of review must be applied in a desegregation case. *United States* v. *Board of School Comm'rs of Indianapolis*, 637 F. 2d 1101, 1116 (7th Cir.), *cert. denied* 449 U.S. 838 (1980); *Evans* v. *Buchanan*, 582 F. 2d 750, 760 (3d Cir. 1978) (*en banc*), *cert. denied*, 446 U.S. 923 (1980); *Stout* v. *Jefferson County Board of Education*, 489 F. 2d 97, 98 (5th Cir. 1974) (*per curiam*); *Kelly* v. *Guinn*, 456 F. 2d 100, 111 (9th Cir. 1972), *cert. denied*, 419 U.S. 919 (1979). *See also*, *Arthur* v. *Nyquist*, 636 F. 2d 905, 906 (2nd Cir. 1981).

[11] The Court of Appeals held that "white flight," the decreasing percentage of white students attending the public school system, may not be considered in choosing among permissible desegregation remedies. In so holding, the Sixth Circuit directly contradicted the Fifth Circuit, which has held that "white flight" may be so considered. *See, Stout* v. *Jefferson County Board of Education*, 537 F. 2d at 802. Other circuits have held that white flight may be considered by school boards adopting voluntary desegregation plans. *See, Johnson* v. *Board of Education of Chicago*, 604 F. 2d 504, 516-17 (7th Cir. 1979), *vacated on the other grounds*, 449 U.S. 915 (1980); *Parents Ass'n of Andrew Jackson High* v. *Ambach*, 598 F. 2d 705, 719 (2nd Cir. 1979); *Higgins* v. *Board of Education of the City of Grand Rapids*, 508 F. 2d 779, 794 (6th Cir. 1974).

These findings, which were not reversed as clearly erroneous by the Court of Appeals, demonstrate that the District Court did not abuse its discretion by ruling that the 1981 plan would be a better means of eradicating the continued effect of past constitutional violations than would continued use of the 1971 plan. The 1981 plan creates more integrated schools for children in grades 5-12 than does the 1971 plan and requires special educational programs, such as black history courses and a magnet school, not included within the 1971 plan. The District Court concluded that children in grades K-4 would be best served by being kept in the same school for grades K and 1 and by being exposed to special educational programs, neither of which the 1971 plan requires. The decision, after nine years of mandatory busing of children, that funds for transportation would be better used to provide more teachers and remedial classes, *see*, 511 F. Supp. at 1368-69; A. 139-42; 492 F. Supp. at 192; A. 115, rather than to bus students is a choice among equitable remedies well within the discretion of the District Court. As Judge Celebrezze stated, "the district court made extensive factual findings, supported by the record, and grounded his decision on the risk that the entire desegregation remedy might fail in the long run if very young children were included within the busing program." A. 35.

The refusal of the Sixth Circuit to affirm the District Court's choice of equitable remedies was clear error. The Court of Ap-

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In this case, the District Court explicitly found that the "greater concern" affecting white parental support of public schools was "with the quality of education received, or perceived to be received," rather than remnants of racial prejudice. 492 F. Supp. at 190; A. 110. The educational portions of the remedy are designed, "as an essential ingredient to the remedy and also as a reinforcement to parental perception of and *support for* the system." *Id.*, at 191; A. 113 (Emphasis in original).

peals reversed the District Court only becaue it "was vaguely dissatisfied with the limited character of the remedy which the District Court had afforded plaintiffs," *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 418 (1977), although it neither reversed the District Court's findings of fact as clearly erroneous nor held that the District Court failed to implement an effective desegregation remedy.

CONCLUSION

This case presents this Court with a question of increasing national importance. As the years pass, the school desegregation decrees handed down pursuant to this Court's opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education* will come under re-examination as plaintiffs and defendants alike ask district courts to modify desegregation plans in light of changing conditions. The essence of an equity court is its ability to act flexibly in order to tailor individual orders to local conditions. *See, Hecht Co.* v. *Bowles,* 321 U.S. 321, 329-30 (1944). District courts, which are acquainted with the activities of local government, have long been recognized to be the level of the federal judiciary that "can best peform" the task of formulating desegregation commands. *Brown* v. *Board of Education,* 349 U.S. 294, 299 (1955).

The Sixth Circuit's decision in this case is worthy of review because it misconstrues the prior decision of this Court and because it creates direct conflicts with other federal courts of appeals. Perhaps more importantly, the Sixth Circuit's opinion, if allowed to go unchallenged, will lead to confusion across the nation concerning the manner in which desegregation decrees may be modified. As Judge Celebrezze wrote in dissent, "[a] careful reading of the entire record, and my experience with the previous appeals filed in this litigation, leads me be believe that Judge Wiseman has addressed a difficult problem and is,

together with the local community, making a sincere effort to being a decree of finality to this longstanding issue." A. 36. Davidson County, and countless other communities across the nation, will be ill-served if their sincere efforts are rejected on grounds clearly contrary to this Court's precedent.

Respectfully submitted,

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82-702

No.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,
Petitioners,

v.

ROBERT W. KELLEY, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX A

No. 81-5370

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Robert W. Kelley, et al.,
Plaintiffs-Appellants,

v.

Metropolitan County Board of
Education of Nashville and
Davidson County, Tennessee,
Defendants-Appellees.

Appeal from the
United States District
Court for the Middle
District of Tennessee.

Decided and Filed July 27, 1982

Before: EDWARDS, Chief Judge, JONES, Circuit Judge and CELEBREZZE, Senior Circuit Judge.

EDWARDS, Chief Judge, delivered the opinion of the Court, in which JONES, Circuit Judge, joined. CELEBREZZE, Circuit Judge, (pp. 25-35) filed a separate opinion, concurring in part and dissenting in part.

EDWARDS, Chief Judge. This much delayed school desegregation case is before this court for review of a desegrega-

tion plan approved by the District Court.[1] It offers no new legal issues and can and must be decided by this court on the basis of final decisions of the United States Supreme Court. *Milliken* v. *Bradley,* 433 U.S. 267 (1977) (Milliken II) requires our affirmance of the District Court on several issues. The cases that require our reversal of two issues decided by the lower court are legion. Leading the list are *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Green* v. *County School Board,* 391 U.S. 430 (1968); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973); *Penick* v. *Columbus Board of Education,* 583 F.2d 787 (6th Cir. 1978), *aff'd,* 443 U.S. 449 (1979); *Reed* v. *Rhodes,* 607 F.2d 714 (6th Cir. 1979, *cert. denied,* 445 U.S. 935 (1980); and last but not least, *Kelley* v. *Metropolitan Board of Education,* 463 F.2d 732 (6th Cir.), *cert. denied,* 409 U.S. 1001 (1972).

It should be noted at the outset that this case is markedly distinguished in legal terms from those that have come before this and other courts from states where segregation by law has never existed or was long ago statutorily abandoned. In those cases, the federal courts have been primarily concerned with the question of whether or not predominantly black and predominantly white schools existed as a result of intentional segregative practices on the part of the school boards concerned. *See Reed* v. *Rhodes, supra; Penick* v. *Columbus Board of Education, supra; Brinkman* v. *Gilligan,* 583 F.2d 243 (6th Cir. 1978), *aff'd sub nom, Dayton Board of Education* v. *Brinkman,* 443 U.S. 526 (1979) (Dayton II). No such inquiry is necessary in this case; Tennessee's history of *de jure* segregation is well-established.

In 1955, when litigation aimed at desegregating the Nashville schools began, racial segregation was constitutionally and

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[1] *Kelley* v. *Metropolitan County Board of Education,* 511 F. Supp. 1363 (M.D. Tenn. 1981).

statutorily mandated in Tennessee, and the School Board was in full compliance with those provisions. Article 11 § 12 of the state constitution proclaimed: "No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school," and statutes consistent with this provision were enacted. *See* T.C.A. §§ 49-3701 *et seq.* In 1956, the Tennessee Supreme Court struck down the statutes requiring compulsory separation of races, *Roy* v. *Brittain,* 297 S.W.2d 72 (Tenn. 1956), and in 1959 this court invalidated a new law allowing local school boards to provide white, black and mixed schools, with attendance to be determined by parental choice. *Kelley* v. *Board of Education,* 270 F.2d 209 (6th Cir.), *cert. denied,* 361 U.S. 924 (1959). The statutes thereafter were omitted from the revised statutory compilation, with the compiler's note stating the statutes had been omitted because they were unconstitutional, citing to the above-named cases. In 1970, the Tennessee Legislature did pass a law mandating the public schools would be open to persons of all races, *see* Tenn. Code Ann. § 49-1770 (1977). But it was not until 1978 that Tennessee's constitution was amended to delete the requirement of separate schools. Finally, effective March 15, 1979, more than twenty years after the laws were declared unconstitutional, the Tennessee Legislature repealed the old school segregation statutes.

It therefore is clear that when the first "comprehensive and potentially effective desegregation order"[2] was entered in this case in 1971, the existing racial separation in the Nashville schools had resulted from *de jure* segregation. And despite the 1971 plan's potential, the record establishes and the District Court found that desegregation in the Nashville schools has never been achieved. Thus the effects of state-imposed segregation have yet to be eradicated.

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[2] 463 F.2d at 734.

It was the School Board's implementation of the 1971 plan that prevented effective desgregation, according to the District Court. In *Kelley* v. *Metropolitan Board of Education,* 463 F.2d 732 (6th Cir.), *cert. denied,* 409 U.S. 1001 (1972), this court approved the 1971 HEW-drafted desegregation remedy, which was based on *Swann* v. *Charlotte-Mecklenburg, supra,* and which attempted to achieve desegregation through zoning. After the plan had been in effect for one year, the Board petitioned for changes, claiming hardships had arisen from the plan. The District Court emphatically rejected the petition, finding the Board had not acted in good faith in implementing the desegregation remedy. Thereafter, the Board submitted proposals for construction and for a kindergarten program using portables, which both were opposed by plaintiffs as inconsistent with the approved plan. Plaintiffs later petitioned that the Board be held in contempt for its unsanctioned implementation of the proposals. In 1978 the Board petitioned to amend school attendance zones; plaintiffs then amended their contempt petition.

In 1979, the District Court began hearings on all pending matters concerning the school system.[3] From the proof presented, the District Court found the Nashville-Davidson County school system had become increasingly segregated in the years since 1971. The original remedy had not extended throughout the county, and whites had been able to avoid the plan by fleeing to the outer reaches, leaving the inner city schools with a high black population. After reviewing the evidence, the District Court stated, "[t]he resegregation, resulting, at least in part,

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[3] Several of the issues pending before the District Court when hearings were resumed in 1979 still have not been heard. These pending matters include allegations of discriminatory faculty and staff assignments, charges that the defendants are in contempt of court, and motions for attorneys' fees.

from the nonetheless good faith efforts of the School Board in the implementation of the Court's order, amounts to a *de jure* segregation." *Kelley* v. *Metropolitan County Board of Education*, 479 F. Supp. 120, 123 (M.D. Tenn. 1979). This "resegregation" was exacerbated by the Board's institution of an optional transfer policy that violated the spirit of the 1971 order and emasculated desegregation efforts, according to the District Court.

Judge Wiseman's determination that desegregation has never been achieved in the Nashville-Davidson County school system is amply supported by the record, and that finding, therefore, is affirmed. Thus the School Board remains under its duty "to eliminate from the public schools all vestiges of state-imposed segregation." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 US. 1, 15 (1971).

EDUCATIONAL COMPONENTS

As a result of the 1979 hearings, the District Court ordered the Board to formulate a new desegregation plan "assuming no parameters heretofore ordered by the Court, but with the primary objective of the achievement of a unitary school system for the entirety of Davidson County." 479 F. Supp. at 122. After several proposals and in accordance with specific instructions from the District Court, *see Kelley* v. *Metropolitan County Board of Education*, 492 F. Supp. 167 (M.D. Tenn. 1980), the Board drafted a plan that gained the District Court's approval. *Kelley* v. *Metropolitan County Board of Education*, 511 F.Supp. 1363 (M.D. Tenn. 1981). It is plaintiffs' appeal from this order that is before us.

We affirm certain aspects of this plan. With regard to the District Judge's orders concerning education components, we approve the remediation program planned by the Board of Education's staff for "those schools or classes where the achievement levels are below the average for the system and/or

where the majority of a school's population is made up largely of socio-economically deprived children who suffer the continuing effects of prior discrimination." 511 F. Supp at 1368-69. Our affirmance of this issue does not depend upon the outcome of any other issue in this case, nor does it depend upon whether or not Title I federal funds are available. *See Milliken* v. *Bradley*, 433 U.S. 267 (1977).

Likewise, this court affirms the District Judge's order for the use of West End Junior High School as a magnet school, with selection criteria designed to provide equal access to all races. Further, we affirm the District Court's approval of the already launched Afro-American studies program. While we note plaintiffs' objections to lack of specificity of such programs, we believe this is a matter that can be handled by the District Court and the School Board without intervention by the appellate court. Finally, we affirm the Distract Judge's approval of the "Together We Can. . . Together We Will" program.

PUPIL ASSIGNMENT COMPONENT - MIDDLE SCHOOLS AND HIGH SCHOOLS

In large measure, the pupil assignment components of this plan do not withstand constitutional scrutiny. In fashioning its school desegregation plan, the Board was directed by the District Court to bring about a 15% minimum presence of either race in each middle school (grades 5-8), and application of this standard to the high schools as well was accepted by the lower court. The District Court's choice of 15% either race minimum presence as a desegregation standard would find acceptable schools that are either 85% white or 85% black. This figure is clearly not appropriate as a "starting point" in a school system that has a 68% white-32% black racial composition.[4]

---

[4] At the middle school level, seven of the 24 schools are projected as majority black, and fully one-half would fall outside of a 15% plus or minus deviation from the 32% minority presence in the school system.

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23-25 (1971), Chief Justice Burger wrote for a unanimous Supreme Court as follows:

> In this case it is urged that the District Court has imposed a racial balance requirement of 71%-29% on individual schools. The fact that no such objective was actually achieved - and would appear to be impossible - tends to blunt that claim, yet in the opinion and order of the District Court of December 1, 1969, we find that court directing
>
> "that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others . . . . [t]hat no school [should] be operated with an all-black or predominantly black student body, [and] [t]hat pupils of all grades [should] be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students."
>
> The District Judge went on to acknowledge that variation "from that norm may be unavoidable." This contains intimations that the "norm" is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.
>
> As the voluminous record in this case shows, the predicate for the District Court's use of the 71%-29% ratio was twofold: first, its express finding, approved by the Court of Appeals and not challenged here, that a dual

school system had been maintained by the school authorities at least until 1969; second, its finding, also approved by the Court of Appeals, that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the patient efforts of the District Judge who, on at least three occasions, urged the board to submit plans.[8] As the statement of facts shows, these findings are abundantly supported by the record. It was because of this total failure of the school board that the District Court was obliged to turn to other qualified sources, and Dr. Finger was designated to assist the District Court to do what the board should have done.

(footnotes 7 and 9 omitted).

We see therefore that the use of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstances. As we said in *Green*, a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

---

[8] The final board plan left 10 schools 86% to 100% Negro and yet categorically rejected the techniques of pairing and clustering as part of the desegregation effort. As discussed below, the Charlotte board was under an obligation to exercise every reasonable effort to remedy the violation, once it was identified, and the suggested techniques are permissible remedial devices. Additionally, as noted by the District Court and Court of Appeals, the board plan did not assign white students to any school unless the student population of that school was at least 60% white. This was an arbitrary limitation negating reasonable remedial steps.

As mentioned earlier, this record shows the black-white pupil ratio in the Nashville-Davidson County school system to be 68% white and 32% black. It is that ratio the District Court should have employed as the "starting point" in the remedy-fashioning process.

The District Judge selected the admittedly arbitrary 15% either race figure because "it seem[ed] to represent a reasonable attempt to provide intercultural and interracial contact as a foundation for social harmony." 492 F. Supp. at 193. This selection, and such other errors as we find in the District Court's opinions and orders, originate with his apparent conclusion that the unanimous opinion of the Supreme Court in *Swann* has somehow been overruled or eroded. But the disposition of cases originating in this and other circuits does not support any such conclusion. In fact, *Swann* was strongly reaffirmed by the Supreme Court's approval of this court's opinion in *Penick* v. *Columbus Board of Education*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979). The *Swann* opinion is the law of the land. And this court, the District Court for the Middle District of Tennessee, and the School Board of Nashville and Davidson County are required by our constitutional form of government to follow its standards. In accordance with those standards, the District Judge will be required on remand of this case to determine the currently prevailing racial population of the school system concerned and to employ that ratio as a "useful starting point in shaping a remedy to correct past constitutional violations."

We approve all other aspects of the middle school and high school plans, recognizing, of course, that rejection of the 15% either race minimum presence as a desegregation standard will necessarily involve significant redrafting and restructuring. Whenever the *Swann* discussion set out above requires revision of these school plans, such revisions must be made. We note our awareness that this instruction encompasses *Swann's* recogni-

tion that there is no constitutional right to any "particular degree of racial balance." But we also recognize that predominantly one-race schools deserve "close scrutiny" and that the duty on the Board and courts to dismantle a dual system is clear:

> The district judge or school authorities should make every effort to achieve the *greatest possible degree of actual desegregation* and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but *in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition.* Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

Swann, supra at 26. (emphasis added).

In line with this duty, we suggest the formula employed by this court in the *Columbus* case, *i.e.*, use of a 15% plus or minus deviation from the 68-32% white-black ratio for all students in the schools system.[5]

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[5] An essential element of the plan on remand thus will include "reassigning students to achieve the greatest possible number of

PUPIL ASSIGNMENT COMPONENT - GRADES K-4

The District Court directed the Board "to establish a system of K-4 or K-5 [Kindergarten through fourth or fifth grade] elementary schools of a neighborhood character, all the while

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desegregated schools." *See Liddell* v. *Board of Education of City of St. Louis,* 667 F.2d 643 (8th Cir. 1981). We reemphasize that we are not requiring any *precise* degree of racial mixing, but we are requiring the District Court to use all feasible methods of pupil assignment to achieve the maximum amount of integration possible.

A directive to employ a racial balancing approach clearly is anything but novel. For example, this court in *Northcross* v. *Board of Education of Memphis City Schools,* 466 F.2d 890 (6th Cir. 1972), *cert. denied,* 410 U.S. 926 (1973), approved the District Judge's view that *Swann* required more "intensified desegregation efforts" for Memphis than a neutral geographic zone assignment plan and his concomitant order of busing to achieve racial balance. We stated:

> It is thus clear that far from having achieved a unitary school system, the Board has helped to perpetuate the old dual system. Under these circumstances *there can be no doubt that the District Court was under an obligation to order the adoption of a plan providing for further desegregation.* Since many of the one-race schools are clearly the result of discriminatory actions of the School Board *there can be no doubt that under any interpretation of Swann the elimination of such schools must be one of the objectives of any appropriate desegregation plan.*

Id. at 893-94 (emphasis added).

It is beyond dispute that Nashville has never achieved unitary status, in large part because of the Board's implementation of the 1971 plan. We do not believe the District Court and Board fulfilled their duties to eliminate one-race schools by accepting as desegregated 85% black and 85% white schools.

We recognize our directive to the District Court in this case is quite specific. Our specificity, however, is made necessary by our view that "a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is . . . intolerable." *Green* v. *County School Board,* 391 U.S. 430, 438 (1968).

maximizing opportunities for integration in a neighborhood setting.'"[6] The Board complied, and this plan was approved by the District Court. This was fundamental error, unconstitutional under *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Green* v. *County School Board,* 391 U.S. 430 (1968); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Keyes* v. *School District No. 1,* 413 U.S. 189 (1978); *Penick* v. *Columbus Board of Education,* 443 U.S. 449 (1979), and *Dayton Board of Education* v. *Brinkman,* 443 U.S. 526 (1979). All of these cases have held or implied that the constitutional barrier to racially segregated schools applies to *all* schools in the system, including the early grades.

In this case, the District Judge's order would serve to resegregate or to maintain segregation in grades K-4. Forty-seven of the 75 elementary schools would be more than 90% one race, with 14 schools projected as more than three-fourths black.

The District Judge based his directive on the perceived benefits of a neighborhood school system for elementary students, noting the desirability of parent-teacher contact, reduced pupil-teacher ratios, and other "educational" advantages.[7] In *Swann,* Chief Justice Burger considered pro-neighborhood arguments, presumably similar to those influencing the District Judge in this case, and found them wanting:

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[6] 511 F. Supp. at 1371.

[7] The importance of desegregated schools, however, particularly for minority students, was recently emphasized by the Supreme Court:

> Education has come to be "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954). When that environment is largely shaped by members of different racial and cultural groups, minority children can

Washington v. *Seattle School District*, 50 U.S.L.W. 4998, 5002 (June 30, 1982).

> Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be diseirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.
>
> No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is

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achieve fheir full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U.S. 437, 451 (1980) (POWELL, J., dissenting).

> proper to achieve truly non-discriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

402 U.S. at 28.

It is thus clear from *Swann* that no matter whether neighborhood schools may be desirable on some grounds, their advantages cannot outweigh the constitutional requirement to desegregate the schools.[8]

The unanimous *Swann* opinion also dealt squarely with the issue of busing, another concern of the District Judge in this case:

> (4) *Transportation of Students*
>
> The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations. Bus transportation has been an integral part of the

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[8] In the Supreme Court's latest consideration of the neighborhood school concept, the majority struck down a statewide initiative adopted by the voters of the state of Washington that would have required limiting school attendance to those students residing in the neighborhood of the school concerned. While the majority decision was joined by five Justices, the four dissenters emphasized that they disagreed because there was no "affirmative duty to integrate the schools in the absence of finding of unconstitutional segregation." *Washington* v. *Seattle School District*, 50 U.S.L.W. 4998 (June 30, 1982). In so doing, the four dissenters cited with approval the case upon which this opinion strongly relies, *Swann, supra.*

Thus we read *Washington* v. *Seattle School District* as unanimous on the crucial issue in our present Nashville case.

public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. Eighteen million of the Nation's public school children, approximately 39%, were transported to their schools by bus in 1969-1970 in all parts of the country.

The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible in this and the companion case, *Davis, supra.*[11] The Charlotte school authorities did not purport to assign students on the basis of geographically drawn zones until 1965 and then they allowed almost unlimited transfer privileges. The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

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[11] During 1967-1968, for example, the Mobile board used 207 buses to transport 22,094 students daily for an average round trip of 31 miles. During 1966-1967, 7,116 students in the metropolitan area were bused daily. In Charlotte-Mecklenburg, the system as a whole, without regard to desegregation plans, planned to bus approximately 23,000 students this year, for an average daily round trip of 15 miles. More elementary school children than high school children were to be bused, and four and five-year-olds travel the longest routes in the system.

Thus the remedial techniques used in the District Court's order were within that court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority.

The decree provided that the buses used to implement the plan would operate on direct routes. Students would be picked up at schools near their homes and transported to the schools they were to attend. The trips for elementary

school pupils average about seven miles and the District Court found that they would take "not over 35 minutes at the most."[12] This system compares favorably with the transportation plan previously operated in Charlotte under which each day 23,600 students on all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour. In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walkin school.

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[12] The District Court found that the school system would have to employ 138 more buses than it had previously operated. But 105 of those buses were already available and the others could easily be obtained. Additionally, it should be noted that North Carolina requires provision of transportation for all students who are assigned to schools more than one and one-half miles from their homes. N. C. Gen. Stat. § 115-186(b) (1966).

Swann, supra at 29-31.

An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan in light of what is said in subdivision (1), (2), and (3) above. It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. The reconciliation of competing values in a desgregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed.

The Court's approval of transportation for elementary students illustrates the fact that these groups of children are not automatically or easily exempted from a busing program. Only when "the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process" should elementary children be omitted from a busing plan. No such showing was made or required by the District Court in this case.[9]

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[9] The Circuit Courts generally have disapproved desegregation plans that do not include all grades in the school system, often noting that *Brown* v. *Board of Education* itself involved segregated elementary schools. "It is axiomatic that black students, particularly in the elementary grades, suffer irreparable harm from the maintenance of a segregated school system." *United States* v. *School District of Ferndale,* 577 F.2d 1339 (6th Cir. 1978). In *Haycraft* v. *Board of Education,* 585 F.2d 803, 805 (6th Cir. 1979), *cert. denied,* 443 U.S. 915 (1979), this court rejected a plan that exempted first-graders from busing, saying, "To exempt first grade students from busing would leave vestiges of segregation intact contrary to this Court's mandate." The District Court found that first graders would be subject to "a high risk of failure" if forced to participate in a busing program, but this court found such arguments an insufficient basis for exclusion. In *Lee* v. *Macon County Board of Education,* 616 F.2d 805 (5th Cir. 1980), the Fifth Circuit disapproved a neighborhood school plan in a case much like *Kelley.* In *Lee,* grades K-5 would attend neighborhood schools with the result that two-thirds of elementary black students would attend schools more than 95% black. The District Judge had based his remedy on findings that attending a school near home was important for young children and that pairing would interfere with individualized instruction. The appellate court held these reasons "legally insufficient."

> If the decision were ours initially, we might pay greater heed to the education disadvantage of the rapid dismantling of a dual school system. We may not, however, weigh advantages against disadvantages, for that judicial balancing has already been accomplished. The law orders eradication of all vestiges of the dual system, if some feasible plan can be devised.

616 F.2d at 811 (citing *Swann* at 15).

footnote 9 continued

The court said despite the school board's "apparent good faith attempt to desegregate in 1970," the system had never become a unitary one. Therefore, the duty to dismantle the dual school system continued, and residential patterns could not serve to justify racial imbalance. In rejecting the District Court's plan, the *Lee* court noted that the temporary or permanent presence of one or more racially identifiable elementary schools, or even an omission of some of the earlier grades from a busing program, *might* be permissible. It stressed the need, however, for detailed fact-findings indicating the circumstances motivating "any variations from complete desegregation of Tuscaloosa's schools." *Id.* at 812.

Numerous other courts have reached similar conclusions. In *Keyes* v. *School District No. 1,* 521 F.2d 465 (10th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976), the Tenth Circuit rejected a "part-time" desegregation program for elementary students. The District Court had permitted children to spend part of the school day at their neighborhood schools, citing a need for recreational, extra-curricular and parental activities. In disapproving this plan, the appeals court stated, "although we acknowledge such neighborhood contact to be important, we cannot place it above the constitutional rights of children to attend desegregated schools. We perceive those rights to include full-time attendance in a desegregated setting." *Keyes* at 478. *See also Adams* v. *United States,* 620 F.2d 1277 (8th Cir.), *cert. denied,* 449 U.S. 826 (1980); *Anderson* v. *Dougherty City Bd. of Educ.,* 609 F.2d 225 (5th Cir. 1980); *Mills* v. *Polk County Bd. of Educ.,* 575 F.2d 1146 (5th Cir. 1978); *United States* v. *Texas Ed. Agency,* 532 F.2d 380 (5th Cir.), *vacated and remanded on other grounds,* 429 U.S. 990 (1976), *concepts reaffirmed,* 564 F.2d 162 (5th Cir. 1977); *Clark* v. *Bd. of Educ.,* 465 F.2d 1044 (8th Cir. 1972), *cert. denied,* 413 U.S. 923 (1973); and *Flax* v. *Potts,* 464 F.2d 865 (5th Cir. 1972), *cert. denied,* 409 U.S. 1007 (1972).

Also instructive is the Supreme Court's treatment of *Estes* v. *Metropolitan Branches of the Dallas NAACP,* 444 U.S. 437 (1980) (opinion below at 572 F.2d 1010). The Fifth Circuit had rejected the District Court plan for desegregating Dallas on the basis that it left existing a large number of one-race schools (defined as more than 75% one-race). Under the District Court's plan, grades K-3 remained in neighborhood schools, and no busing of high school students was ordered; these limitations were largely based on the District Court's concerns over resegregation, community support, and the social and educational consequences of extensive busing. The Fifth Circuit remanded and ordered the court to rezone or to provide time and

In sum, while neighborhood schools may be desirable in a school system free of a history of segregation, where such a history exists, a plan must do more; it must make "every effort to achieve the greatest possible degree of actual desegregation." Some inconvenience and even awkward remedies may be necessary where neutral assignment plans fail to desegregate the schools.[10]

Because the remedy leaves elementary schools highly segregated, the District Court's approval of a neighborhood school plan for grades K-4 is rejected. On remand, the District Judge is instructed to include these children within a pupil assignment program drafted in compliance with this opinion, except where inclusion would "risk the health of the children or significantly impinge on the educational process" within the meaning of *Swann*.

It appears to this court that Nashville has some great advantages for solving the desegregation problem. It is a far more compact city than, for example, Cleveland or Detroit, and in general, the schools in need of desegregation are centrally located. Of equally great importance, the school system is

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footnote 9 continued

distance studies that would explain failure to use pairing and clustering or busing to eliminate one-race schools through further busing"; however, the writ was later dismissed as improvidently granted. Justices Powell, Rehnquist and Stewart dissented from the dismissal, stressing a need to affirm the District Court's "sensitive" and "promising" plan. The dismissal, however, indicates the remaining members of the court disagreed. The withdrawal of certiorari suggests, particularly in the fact of the dissent, that the majority approved the Fifth Circuit's handling of the District Court's plan. In line with the Fifth Circuit, we are ordering the lower court to eliminate as far as possible the one-race or virtually one-race schools and to explain with "time and distance studies" or by reference to "natural boundaries or traffic patterns" why elimination is not feasible for any remaining schools.

[10] *See Swann, supra* at 28.

organized on a Davidson County-wide basis. We approve the Board's and District Court's intention to apply the desegregation plan to the entire county.

As we have shown above, we are convinced the District Court's approval of the Board's plan was legal error.[11] In addition, we recognize the lower court's approval was based in part on a conviction, with which we take issue, that desegregation has not advanced the educational achievement levels of black children and that it is a serious "education cost" in the elementary grades. It was largely for these reasons, along with a fear of increased "white flight,"[12] that Judge Wiseman was persuaded to deviate from a *Swann*-type remedy. *See* 492 F. Supp. at 189-92. While doubtless the jury on the educational benefits of desegregation will be out for a long time, recent findings indicate results directly contrary to the views expressed by the District Judge. Some of this material is very current and therefore was unavailable to Judge Wiseman at the time his opinions were written.[13] We note these findings only because of the District Court's strong reliance on this matter. We also note and take this opportunity to remind the District Court that the issue of achievement scores is constitutionally irrelevant in a school system with a history of illegal segregation.

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[11] The dissent suggests that we have not employed an abuse of discretion standard in reviewing the District Court's plan. "Improper application of the law, however, is itself an abuse of discretion. An appellate court may reverse if the decision below was based on an erroneous view of the law. . . ." *United States* v. *School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978).

[12] Where the Board and court are under a duty to dismantle a dual system, white flight cannot be used to justify a failure to meet the obligation. In *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484, 491 (1972), the Supreme Court states: "While this development [white flight] may be cause for deep concern to the respondents, it cannot, as the Court of Appeals recognized, be accepted as a reason for achieving anything less than complete uprooting of the dual public school system."

[13] These findings can be found in the Appendix to this opinion.

REMAINING ISSUES

We now turn to other issues advanced by plaintiffs' appeal. First, it is urged that the approved plan places a disproportionate burden of busing on black middle school students. Any intentional effort to make the transportation burden fall more heavily on one race than on the other would, of course, be violative of basic constitutional law. Many factors, however, must be taken into account in working out a practical assignment system, including availability of schools, locations of schools, ease of travel between specific neighborhoods and specific schools, and the facilities for education existing in such schools. By mentioning these factors, we do not by any means attempt to exhaust the list; the foregoing are cited purely for illustration. With regard to the plaintiffs' middle school busing burden issue, we are unable to find the District Judge's disposition of this issue either clearly erroneous as to facts or in violation of law. It is obvious, however, that our rejection of the 15% either race minority presence as a desegregation standard will necessitate a substantial revision of the middle school busing program. Thus, the above is suggested as guidance to the District Judge in weighing a new plan.

Plaintiffs also urge the retention of Pearl High School as a senior high, objecting to its use as a middle school under the Board's plan. We, like the District Judge, sympathize with plaintiffs' argument for retention of Pearl as a high school because of its "historic contribution to the black community of Nashville," 492 F. Supp. at 184. We do not find, however, that the School Board's decision, as affirmed by the District Judge, to convert Pearl into a middle school and to build a new Pearl-Cohn comprehensive high school to be based on clearly erroneous findings or founded in a racially discriminatory purpose. Under these circumstances, we are not empowered to overturn the apparently nondiscriminatory educational decision here involved.

As to plaintiffs' last issues, however, we feel quite differently. Plaintiffs' argument that faculty and staff assignments have been made on a racially discriminatory basis should long ago have been the subject of hearing and decision. Faculty desegregation is a considerably easier task than is overall desegregation of schools. Similarly, we believe that there long ago should have been a hearing on plaintiffs' motion for attorneys' fees and expenses. Finally, we observe that plaintiffs' charges of contempt against the defendants should not be left in limbo.

From this distance, we can make no judgment on these matters since no factual record has been written. The District Court, however, should give prompt attention to all three of these issues. The delays in this case suggest that absolute priority be accorded to this litigation until a unitary system has been achieved.

The dissent in this case is in utter disregard of the Supreme Court's interpretation of the Constitution of the United States in such cases as *Brown, supra; Green, supra; Swann, supra; Keyes, supra; Penick* v. *Columbus Bd. of Educ., supra;* and *Dayton I, supra.* It goes without saying that this court is required to follow constitutional law as defined by the Supreme Court of the United States. *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803); *Cooper* v. *Aaron,* 358 U.S. 1 (1958).

The judgment of the District Court is affirmed in part, reversed in part, and remanded for proceedings not inconsistent with this decision.

APPENDIX

After this case was argued in this court, a study made under the auspices of Vanderbilt University and now published in the nine volume ASSESSMENT OF CURRENT KNOWLEDGE ABOUT THE EFFECTIVENESS OF SCHOOL DESEGREGATION STRATEGIES (Vander-

bilt Univ. 1981) [hereinafter cited as DESEGREGATION STRATEGIES] was released. The Vanderbilt project was financed with federal funds and incorporates the work of nationally prominent experts in the school desegregation field. It concludes that desegregation raises the level of black achievement, with specific findings on the Nashville schools, and emphasizes the importance of including primary grades in a desegregation plan. Significant findings include the following:

1. "It seems reasonably clear that minority children who attend school with white children perform better on standardized achievement tests than do children who attend segregated schools." 2 DESEGREGATION STRATEGIES at 33. *See also* Crain & Mahard, *Desegregation and Black Achievement: A Reivew of the Research,* 42 LAW & CONTEMP. PROB. 17 (Summer 1978). For example, a study of Nashville elementary schools revealed that black children's test scores rose an average of .28 when placed in desegregated schools. This amounts to a little over 3/10ths of a grade level and was termed a "sizeable" achievement gain. 5 DESEGREGATION STRATEGIES at 184. It also is estimated that desegregation tends to raise black achievement by approximately four IQ points.

2. To boost achievement, desegregation must occur in the early grades.

> The findings that strong effects of desegregation occur in the earliest grades are a strong argument against delaying desegregation past grade one. Only a few school systems leave the early primary grades segregated; the most significant is Dallas. Our analysis indicates that this is a very unfortunate policy. Many school systems leave kindergarten students segregated. This analysis suggests it would be academically very beneficial to include minority kindergarten students in a desegregation plan.

Id. at 185.

The study concludes that desegregation "creates a sudden burst of achievement growth" during the early grades and that after that time, desegregated students maintain but do not increase this higher level of achievement. The study also notes, "[N]o desegregation plan where elementary grades are excluded can effectively reduce racial isolation. Moreover, the research suggests that desegregation at early grades holds the greatest promise for improving race relations, increasing minority achievement and ultimately reducing racial prejudice." *Id.* at 70.

3. Racial proportions in the school are related to achievement. The study suggests that minority students score higher when they are in predominantly anglo classrooms; however, it is important that more than a small number of minority students attend majority schools. Where minority students comprise less than 15% of the school's population, little mixing of races occurs, and where blacks make up less than 20% of a high school's population, black male achievement suffers. *Id.* at 115, 173, 186 and 196.

4. Where a school district is organized on a county-wide basis, as is the Nashville-Davidson County school system, "white flight" has much less long-term impact on the schools, *Id.* at 47.

A 1981 study by the National Assessment of Educational Progress, a federally sponsored group that annually tests 9-, 13- and 17-year-olds, reports that black achievement scores have increased significantly over the past 10 years. In an assessment of reading performance, the study found that while black students still scored below white students, they had narrowed the gap considerably. For example, 9-year-old black students were 14.2 percentage points below the national norm in 1971 in literal

comprehension, but in 1980 black students were only 7.1 percentage points below the national average. This result was achieved in the fact of an overall achievement gain for *all* tested students. Black students scored achievement gains at all three age groups, although increases were more significant for the 9-and 13-year-olds than for the 17-year-olds.

This black achievement gain extends from reading into other disciplines, according to Burton & Jones, *Recent Trends* in *Achievement Levels of Black/White Youth,* EDUCATIONAL RESEARCHER (April 1982). That article analyzes tests administered over five subject areas form 1969 to 1980 by the National Assessment of Educational Progress and concludes:

> For the learning areas other than writing, the average difference between white and black 9-year-olds has shrunk from about 17 percentage points to 10 or 11 over the 1970s. At age 13 (Figure 5) methematics is relatively the most difficult area for black students. For the areas other than mathematics, means for 13-year-old black students were 17 to 18 percentage points below those for white students in 1970, but only 12 to 13 points below by 1980. A decrease in the difference between white and black students over time is evidence at both ages.
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> Typically, when achievement for white students has declined, that for black students has declined less; when whites have improved, blacks have improved more. The difference between the races has decreased at both ages in mathematics, science, reading, writing and social studies.

Id. at 11-12, 14.

Neither the National Assessment project nor authors Burton and Jones go so far as directly to attribute black achievement gains to desegregation. It is stated, however, that the findings

"cast doubt on judgments that these social programs have failed." Burton and Jones, *supra* at 10.

These recent studies, published after the District Judge's decision, undercut his finding that the black-white achievement gap has narrowed only "slightly" and that improvement had plateaued in 1975. *See* 492 F. Supp. at 190-91 n. 46. On the contrary, the impact of these studies is that desegregation raises the level of black achievement.

CELEBREZZE, J., concurring in part and dissenting in part.

I concur in the majority's decision to affirm the educational components of the district court's plan: the establishment of remediation programs, the creation of a magnet school at West End Junior High School, and the development of an Afro-American studies program. I disagree, however, with my distinguished colleagues and the portion of the decision that reverses the district court's pupil assignment plans. After a careful reading of the record in this case, I believe that the Davidson County community, the board of education, and the district judge are making significant progress towards affording a constitutionally acceptable educational system and that this court should allow the local community and federal court to proceed with their innovations and programs. In my view, the district court did not make clearly erroneous findings of fact and did not abuse its discretion in forming its remedy.

I.

This appeal is part of a desegregation case which has spanned a generation and raises issues concerning the breadth of the district court's discretion and the scope of this court's review. A brief examination of the district court's conclusions is, therefore, necessary.

In 1971, after sixteen years of litigation, the district court adopted a comprehensive desegregation plan which required an "ideal student ratio" of 15 to 35 percent black students in each school and ordered substantial additional busing for the 1971-72 academic year. This court affirmed the 1971 order, reasoning that the decision was within the discretion of the district court. *Kelley* v. *Metropolitan County Board of Education,* 463 F.2d 732 (6th Cir. 1972). The litigation continued intermittently through the 1970's and, in 1979, the district court ordered the parties to reconsider the 1971 desegregation plan in light of the disparate busing burdens, the need to expand the georgraphic scope of the remedy, and changes in the racial composition of and distribution in the community.

This district court held extensive hearings concerning the effectiveness of the 1971 remedy. The school board established a citizens' advisory panel and a planning team which included outside consultants; after a series of public meetings, the board proposed a new desegregation plan. The plaintiffs responded with objections, recommendations, and suggestions for the district court. The district court heard expert testimony and considered various studies concerning test scores, transportation burdens, and white flight, as well as the social, economic, and educational costs of competing desegregation plans.

In evaluating the possible desegregation remedies, the district court made extensive findings of fact. The court found that the Nashville and Davidson County school system had experienced significant white flight under the 1971 busing order.[1] The court further found that white flight was expected to continue so that

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[1] The extent of white flight under the 1971 busing remedy has apparently been substantial. In June, 1971, 66,393 white students attended Metropolitan Nashville schools; in June, 1979, the number had dropped to 44,295. Based on several empirical studies, the district court concluded that the decline was, at least in part, the result of white flight and the resegregation from the 1971 busing order. 492 F. Supp. at 189-90; 479 F. Supp. at 122-123.

25 to 30 percent of the county's elementary school children would be in private schools by the middle or late 1980's. It emphasized that the flight stemmed largely from the public's perception that the system's educational quality was poor. Second, the court found that although test scores for black and white pupils had improved under the 1971 plan, the gap between the scores of the two groups had remained constant. Third, the district court found that the school board's proposed desegregation plan placed a disparate burden on black children, especially those in the early elementary grades, by requiring that black children be bused in numbers disproportionate to their share of the population. Fourth, the district court found that extensive busing plans would have substantial social, economic, and educational costs. 492 F. Supp. at 189-92; 479 F. Supp. at 122-23.

Based on these findings, the district court outlined specific guidelines for a new desegregation plan for the county. Initially, the court extended the geographic reach of the plan to include the entire county.[2] It ordered the school board to send children in grades K to 4 to neighborhood schools, maximizing the desegregation within this limitation.[3] It ordered that in grades 5

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[2] Because of the vast distances in Davidson County, the district court limited the 1971 busing remedy to the densely populated core of the County. After finding that this limitation was hindering the implementation of an effective desegregation remedy, the district court ordered the school board in 1979 to devise a new plan which extended the geographic scope of the busing plan. 479 F. Supp. at 122-23.

[3] In deciding that children in grades K to 4 should go to neighborhood schools, the district court noted that "an objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 30-31 (1971). The district court relied on its detailed findings of fact and concluded that neighborhood schools were necessary for children in grades K to 4.

to 8, the objective should be a minimum presence of 15 percent of either race in each school.[4] In addition, the district court outlined various changes in curriculum, staff, and programs for the Nasvhille school system.

II.

I believe that the majority opinion does not adquately address the district court's findings of fact. With regard to factual questions in desegregation cases, the question on review is whether the findings of fact are clearly erroneous. Fed. R. Civ. P. 52(a). *See Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 534 n.8 (1979) (*Dayton II*). This court may not reverse findings of fact unless it is left with the firm conviction that a mistake has been made. *Alexander* v. *Youngstown Board of Education*, 675 F.2d 787, 795-96 (6th Cir. 1982). *See, e.g., Reed* v. *Rhodes*, 607 F.2d 714, 717 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980); *Penick* v. *Columbus Board of Education*, 583 F.2d 787, 789, 798 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979). This court may not deviate from that standard when it addresses factual findings with which it is vaguely dissatisfied. *See Dayton II*, 443 U.S. at 418.

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[4] The district court observed that:

> The selection of 15 percent is arbitrary, as is any other number which may be chosen. Preparation of students to live in a pluralistic society makes a biracial, intercultural experience highly desirable. However, it was not the intent of Brown and its progeny to require blacks always to be in the minority; nor should these precedents have been read to require assimilation or amalgamation. It is not undemocratic, nor does it violate equal protection of the laws to have a system that allows for recognition of and respect for differences in our society. A rigid adherence to racial ratios premised upon the social goal of assimilation, which in the process demeans, disminishes, or benignly neglects cultural and ethnic pride as well as differences, is not only constitutionally unrequired, but socially undesirable.

492 F. Supp. at 193.

The majority opinion does not subject the district court's findings concerning disparate busing burdens on black children, loss of community support, heavy economic expenses, and significant educational costs under the 1971 plan to careful scrutiny to determine whether they are clearly erroneous. For example, the majority requires the district court to include children in grades K to 4 in its busing plan unless inclusion would "risk the health of the children or significantly impinge on the educational process." *Swann*, 402 U.S. at 30-31. The district court, however, did make findings concerning the educational effects of the remedy on young school children and expressly noted the *Swann* exception.[5] In addition, rather than evaluate the findings concerning white flight and its pertinence to the district court's choice of remedy, *see* notes 1-2, *supra*, the majority simply rejects the notion that the threat of flight is a valid reason for failing to adopt any desegregation plan, a question not presented here.[6]

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[5] 492 F. Supp. at 189-92. *See* note 3, and accompanying text, *supra*.

[6] The threat of white flight may not, of course, be the basis for obstructing a desegregation remedy once a constitutional violation has been found. *See, e.g., Monroe* v. *Board of Commissioners*, 391 U.S. 450, 459 (1968). The concern for white flight in cases where a *Swann* remedy has been in operation for some time, as here, does not reflect an attempt to defeat desegregation efforts, but is considered so that the plan will be effective in the long run.

United States v. *Scotland Neck City Board of Education*, 407 U.S. 484, 491 (1972), indicates that the risk of white flight does not permit a school board to avoid the responsibility of eliminating a dual school system. A district court, however, may consider such a risk in selecting the most desirable plan from among several constitutionally permissible desegregation remedies. In *Stout* v. *Jefferson County Board of Education*, 537 F.2d 800 (5th Cir. 1976), the Fifth Circuit, in examining the application of *Scotland Neck*, stated:

> We have found no authority declaring that in choosing between various *permissible* plans a chancellor may not elect to minimize white boycotts. The teaching of *Scotland Neck* is that he may not refuse to adopt a permissible plan and elect or confect one which preserves a dual system because of such fears. The true issue, then, is whether the plan adopted by the court below was, given the circumstances, a permissible one.

As this court has been previously admonished by the Supreme Court:

> [o]n appeal, the task of a court of appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the district court are clearly erroneous, it may set them aside under Fed. Rule Civ. Proc. 52(a). If it decides that the district court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors. Here, however, as we conceive the situation, the Court of Appeals did neither. It was vaguely dissatisfied with the limited character of the remedy which the district court had afforded plaintiffs, and proceeded to institute a far more sweeping one of its own, without in any way upsetting the district court's findings of fact or reversing its conclusions of law. *Dayton I,* 433 U.S. at 417-18.

After carefully examining the record and extensive findings of fact in this case, especially those concerning population shifts,

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Id. at 802. In this case, the district court evaluated the risk of white flight in determining the *scope* of its busing remedy, not in determining whether to afford a remedy at all. These are entirely separate questions. Other courts have held that the threat of flight is a proper consideration in framing a permissible desegregation plan. *See Johnson* v. *Board of Education of Chicago,* 604 F.2d 504, 517 (7th Cir. 1979), *vacated for consolidation,* ___ U.S. ___ (1982) (a school board may "consider the probability of white flight in formulating a remedial plan to prevent *de facto* segregation in public schools"); *Parent Ass'n of Andrew Jackson High School* v. *Ambach,* 598 F.2d 705, 719 (2nd Cir. 1979); *Higgins* v. *Board of Education of the City of Grand Rapids,* 508 F.2d 779, 794 (6th Cir. 1974).

educational quality, transportation burdens, and social costs, I am not left with conviction that the district court's factual findings are clearly erroneous.

III.

Furthermore, I believe that the majority has erred in its review of the district court's desegregation remedy. When reviewing a district court's desegregation remedy, we are limited to determining whether the district court abused its discretion.[7] *See Milliken* v. *Bradley,* 433 U.S. 267, 281 (1977); *Swann,* 402 U.S. at 15, 25, 27, 30. The Supreme Court has identified the standard for review as the traditional abuse of discretion measure applied to equitable decrees: in a desegregation case, "the scope of a district court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable decrees." *Swann,* 402 U.S. at 15. This discretion comports with the policy of leaving the administration of desegregation plans with the district courts.[8] "Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these [desegregation] cases can best perform this judicial appraisal." *Brown II,* 349 U.S. at 299-300.

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[7] The courts of appeals have held that the standard of review in a desegregation case is whether the district court abused its discretion. *E.g., United States* v. *Board of School Comm'rs of Indianapolis,* 637 F.2d 1101, 1116 (7th Cir.), *cert. denied,* 449 U.S. 838 (1980); *Evans* v. *Buchanan,* 582 F.2d 750, 760 (3rd Cir. 1978) (en banc), *cert. denied,* 446 U.S. 923 (1980); *Stout* v. *Jefferson County Board of Education,* 489 F.2d 97, 98 (5th Cir. 1974) (per curiam); *Kelly* v. *Guinn,* 456 F.2d 99, 110 (9th Cir. 1972), *cert. denied,* 419 U.S. 919 (1979). *See also Arthur* v. *Nyquist,* 636 F.2d 905, 906 (2nd Cir. 1981).

[8] This court may reverse a district court in its formulation of a desegregation remedy only when it has abused its discretion, because the district court is in the best position to weigh the competing equities.

I disagree with the majority's view of the district court's discretion. The majority implies that the district court is obligated to employ a racial ratio which matches the racial composition of the Davidson County school system. My reading of *Swann* is that the district court *may* adopt such a ratio as part of a desegregation remedy. The Constitution does not require the district court to use a ratio which mirrors the racial makeup of the community. *Swann,* 402 U.S. at 23-24. Rather, the district court may use its discretion to determine the proper scope of a busing plan in a desegregation remedy.[9]

The majority's treatment of the pupil assignment component of the desegregation plan is not consistent with the limited scope of our review. The district court did use in 1971, as a "starting point," the approximate racial ratio of the school district as an objective for its busing plan. The district court in 1980 reviewed

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> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Hecht Co. v. *Bowles,* 321 U.S. 321, 329-30 (1944), cited in *Brown II,* 349 U.S. at 300, and *Swann,* 402 U.S. at 15. *See Lemon* v. *Kurtzman,* 411 U.S. 192, 200 (1972) ("[i]n shaping equitable decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow").

[9] The Eighth Circuit has expressly rejected the argument that the desegregation plan for the St. Louis school system must precisely reflect the racial composition of the district. The district court adopted a pupil assignment plan which considered schools with black enrollment of 30 to 50 percent (plus or minus 15 percent) in a system which is 76 percent black. The appellate court found that such deviations are within the discretion of the district court. *Liddell* v. *Board of Education of St. Louis,* 667 F.2d 643, 649 (8th Cir. 1981).

the effectiveness of the 1971 order. After hearing and evaluating a broad range of evidence concerning white flight, test scores, transportation burdens, costs, education theory, and other factors, the district court changed the busing objective to a minimum presence of 15 percent of either race.

The majority opinion seems to recognize that there is no constitutional right to any particular racial balance in schools. *See Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 434 (1976) (no "substantive constitutional right to a particular degree of racial balance of mixing" exists); *Swann*, 402 U.S. at 24. Yet the majority's requirement that the district court employ a ratio of 68 percent white and 32 percent black (plus or minus 15 percent) appears to be an attempt to establish such a balance. I fear that the precise racial mixture required by the majority on remand will, as a practical matter, create such a right. *See Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 418 (1977) (*Dayton I*).

Moreover, I disagree with the majority's treatment of the pupil assignment component for grades K to 4. The majority rejects the district court's decision on the premise that it is required to desegregate all schools and all grades within the school system. I do not believe that the district court's discretion is so narrow. The cases on which the majority relies for its proposition do not support its conclusion.[10] In *Haycraft* v. *Board of*

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[10] The majority's reliance on *Tasby* v. *Estes*, 572 F.2d 1010 (5th Cir. 1978), *cert. dismissed as improvidently granted*, 444 U.S. 437 (1980), is misplaced. First, the circuit court did not hold that *Swann* requires all schools and all grades to be included in a pupil assignment program. It remanded the case because the district court, unlike the lower court in this case, failed to make adequate factual findings. *Id.* at 1014. Second, the Fifth Circuit has expressly ruled that a district court "may devise a constitutional plan that temporarily or permanently leaves one or more racially identifiable elementary schools, or that omits some of the earlier grades from the busing probram." *Lee* v. *Macon County Board of Education*, 616 F.2d 805, 812 (5th Cir.

Education of Jefferson City, 585 F.2d 803 (6th Cir. 1978), *cert. denied,* 443 U.S. 415 (1979), this court reversed a district court which excluded first grade students from a busing plan. In *Haycraft,* the district court made no factual findings; instead, it concluded "as a matter of law" that first grade students without kindergarten experience would risk failure if they rode on a bus to school. *Id.* at 804. Here, the district court made extensive factual findings, supported by the record, and grounded his decision on the risk that the entire desegregation remedy might fail in the long run if very young children were included in the busing program. 492 F. Supp. at 189-93. *Lee* v. *Macon County Board of Education,* 616 F.2d 805 (5th Cir. 1980), does not hold that every grade in a school system must be included in a desegregation remedy. In fact, the Fifth Circuit reasons that "[f]ocusing on the target of a unitary system rather than a systemwide racial balance, the court may devise a constitutional plan that temporarily or permanently leaves one or more racially identifiable elementary schools, or that omits some of the earlier grades from the busing programs." *Id.* at 812. *See generally Swann,* 402 U.S. at 24 ("[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole").

Finally, the majority fails to address directly the issue of the effectiveness of the desegregation plan.[11] "The measure of any desegregation plan is its effectiveness." *Davis* v. *School*

1980). Third, the Supreme Court's decision to dismiss certiorari as improvidently granted provides no indication of the Court's view of the merits and gives the *Estes* decision no precedential power binding on this court. *See Griffin* v. *United States,* 336 U.S. 704, 716 (1958); *United States* v. *Carver,* 260 U.S. 482, 490 (1923).

[11] The Supreme Court's opinion in *Washington* v. *Seattle School District No. 1,* ___ U.S. ___ (1982), does not address the issues raised in this appeal. In *Washington,* the Court found that a state referendum which prohibits mandatory busing of school children for purposes of integration violates the equal protection clause of the four-

Comm'rs of Mobile, 402 U.S. 33, 37 (1971). District court decrees must ultimately be evaluated on the basis of their effectiveness. *See Green* v. *County School Board,* 391 U.S. 430, 439 (1968) (desegregation remedies must be drawn "in light of the circumstances present and the options available"); *Davis,* 402 U.S. at 37 (desegregation remedies must "tak]e] into account the practicalities of the situation"). An effective desegregation plan is one which will establish a unitary school system: "The obligation of the district courts . . . is to assess the effectiveness of a proposed plan in achieving desegregation." *Green,* 391 U.S. at 439. Many factors should be considered in determining whether a particular plan will be effective in establishing a unitary school system. These factors include population shifts,[12] transportation burdens, and the social, economic, and educational costs of competing desegregation plans. The precise weight to be acorded to each factor should be left to the district court's discretion. In my opinion, the district court has properly identified and weighed these various factors and has selected a desegregation remedy which is likely to move Davidson County

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teenth amendment. *Washington* concerns the structure of the state and local political process, rather than the breadth of a district court's discretion in shaping a desegregation decree: "[i]t is the State's race-conscious restructuring of its decisionmaking process that is impermissible." Slip Op., at 28 n.29 ___ U.S. ___, ___ n.29. The Supreme Court has recently reiterated the policy of encouraging flexibility in desegregation remedies and avoiding rigid approaches: "although 'in some circumstances busing will be an appropriate and useful element in a desegregation plan,' in other circumstances 'its "costs," both in financial and education terms, will render its use inadvisable.' " *Crawford* v. *Los Angeles Board of Education,* Slip Op. at 14, *quoting Crawford* v. *Board of Education,* 17 Cal.3d 280, 309 (Cal. 1976), ___ U.S. ___ (1982). *See* Slip Op. at 2 n.3, 9 n.15.

[12] *See* notes 1 and 6 and accompanying text, *supra.*

towards a unitary school system.[13] If lasting solutions for the problems of desegregation are to be found, we must allow the district courts to shape remedies which reflect the practical problems facing a school system and which have a realistic chance of achieving the goals of *Brown I*.

A careful reading of the entire record, and my experience with the previous appeals filed in this litigation, leads me to believe that Judge Wiseman has addressed a difficult problem and is, together with the local community, making a sincere effort to bring a degree of finality to this longstanding issue. I believe that the district court's plan complies with the requirements of *Brown I* and *Swann*. The district court's findings of fact are not clearly erroneous and it has not abused its broad discretion in fashioning the flexible and innovative plan presented to this court. Accordingly, I would affirm the judgment of the district court.

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[13] The majority relies on *Tasby* v. *Estes*, 572 F.2d 1010 (5th Cir. 1978), *cert. dismissed as improvidently granted*, 444 U.S. 437 (1980), asserting that the dismissal of certiorari as improvidently granted is an indication that the Supreme Court supports the majority's interpretation of *Swann*. Although the Court's disposition allows no such inference to be drawn, *see* note 10, *supra*, Justice Powell's dissent, joined by Justices Rehnquist and Stewart, is of interest. The dissent emphasizes the need for flexibility and practicality in reviewing desegregation decrees.

APPENDIX B

Robert W. Kelley, Individually and
representative of the class

v.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee, et al.

Henry C. Maxwell, Jr., Individually
and representative of the class

v.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee, et al.

Civ. A. Nos. 2094, 2956.

United States District Court,
M. D. Tennessee,
Nashville Division.

Aug. 27, 1979.

(Rendered Orally Aug. 24, 1979)

In desegregation action, the District Court, Wiseman, J., held that: (1) given the choice between further delay and implementation of desegregation plan or a haphazardly hurried piecemeal implementation of a portion of the program, court would permit additional year's delay; (2) board's transfer policy, although facially neutral, was having a negative impact; (3) it would violate due process to hold school board members in contempt for the implementation of the school transfer policy where the prior orders of the court had not addressed the matter with sufficient specificity; (4) school board would be required to review transfer applications and determine this validi-

ty before granting them; and (5) the application of any senior to be retransferred to the school which he attended as a junior could be granted.

Order accordingly.

1. Schools (key) 13(20)

Court facing the choices of a further year's delay in implementing a portion of school desegregation plan or a haphazardly hurried construction of partial patches of the plan which would probably worsen the situation would permit the proposed zones of the school board to be continued for use for another year.

2. Schools (key) 13(6)

School board policy for subject matter-program transfers from one school to another, although racially neutral on its face, had a negative impact on desegregation efforts by the manner in which it was implemented and the inherent potential for abuse in its conceptualization and thus violated spirit of court's integration order.

3. Constitutional Law (key) 273

It would violate due process to hold school board members in contempt for implementation of transfer plan where court's desegregation orders did not address the matter with the requisite degree of specificity. U.S.C.A. Const. Amends. 5, 14.

4. Schools (key) 13(20)

Where court had determined that school board's transfer policy which was facially neutral was having a negative impact on desegregation efforts, court would order school board to submit a revision of the transfer policy designed to provide methods by which transfer applications could be objectively

judged, prior to approval, to determine their validity as to the educational objectives of the student; court would require board to review each of the transfer applications which had previously been approved, as well as those currently pending and to make written findings as to the validity of each request.

5. Schools (key) 13(20)

School board would be permitted to grant the application of any senior who requested transfer from a school to which he had been zoned to the high school to which he attended as a junior and such transfers would be exempted from limitations on other transfers set forth in court's desegregation orders.

Avon N. Williams, Jr., Richard Dinkins, Nashville, Tenn., for plaintiffs.

William R. Willis, Jr., Marian F. Harrison, Nashville, Tenn., for defendants.

MEMORANDUM

WISEMAN, District Judge.

This twenty-four-year-old case is before this Court upon a series of motions and petitions by both the plaintiffs and defendants. The various motions, petitions, and pending matters and dates of filing are as follows:[1]

1. March, 17, 1972: Defendants' request for approval of construction of White's Creek Comprehensive High School, included in march 17, 1972, report to this Court and merged into July 24, 1978, petition, listed *infra*.

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[1] Throughout the pendency of this case until and during the recent hearings, the parties have filed various motions relating to discovery matters. The Court has ruled on substantially all discovery issues as they have arisen. Such matters are, therefore, not listed above as pending motions.

2. May 30, 1973: Petition by defendants for approval of long range plan, dealing with twenty-six building projects. This petition has essentially merged into more recent pleadings.[2]

3. May 31, 1973: Defendants' petition for approval of portables for use in kindergartens. No action was taken by the Court in regard to this petition and the defendants subsequently implemented the proposed plan.

4. October 14, 1976: Defendants' motion to amend their May 30, 1973, petition for approval of long range plan. Such motion proposed a new location for the Goodlettsville-Madison High School and asked the Court for approval of construction of that school.

5. December 27, 1976: Plaintiffs' petition for contempt and further relief. Plaintiffs therein moved that defendants be held in contempt for their plan to construct the Goodlettsville-Madison High School, the expansion of Hillsboro, Bellevue, Hillwood, Glencliff, Stratford, and Maplewood high schools, the use of portables for kindergartens, the establishment of the Cole Annex for Cole Elementary School grades five and six at the old Turner School, and the proposed closing of Pearl High School. The Board of Education subsequently rejected the proposal to close Pearl. In this petition, plaintiffs also asked that the Court modify its 1971 order to equalize the burden placed on black and white children as a result of bussing, to compel defendants to maintain a black-white student ratio, and to force defendants to upgrade Pearl High School and inner city schools. Finally, plaintiffs requested attorneys' fees.[3]

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[2] Subsequent to the May 30, 1973, petition, defendants have filed various letters to inform the Court of their plans and actions taken relating to the projects detailed in the petition.

[3] Plaintiffs had previously filed motions for attorneys' fees on February 8, 1974, and April 11, 1975, as well as a motion to dispose of those motions, filed on October 16, 1975.

6. July 24, 1978: Defendants' petition for approval of school attendance zones for 1978-79, as amended August 18, 1978. In this petition, defendants requested court approval of the expansion of Hillsboro, Hillwood, Overton, Maplewood, Glencliff, and Stratford into comprehensive high schools with grades nine through twelve, the addition of grade nine to Cohn and Pearl high schools and to McGavock Comprehensive High School, the opening of the Whites Creek Comprehensive High School to include grades nine through twelve, the elimination of one grade schools, the changes in zoning to alleviate overcrowding and to close inadequate buildings, the plan to develop an inner city comprehensive high school, and the establishment of junior high schools including grades seven and eight with feeder systems into the high schools.[4]

7. August 28, 1978: Plaintiffs' amendment to petition for contempt and for further relief, previously filed on December 27, 1976, and discussed *supra*. Plaintiffs therein allege that construction and expansion of schools in predominantly white areas, and the closure of formerly black schools in the inner city, the institution of optional transfer programs, discussed *infra*, and the failure of defendants to increase the black-white faculty ratio are violative of the 1971 court order.

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[4] On May 29, 1979, defendants filed an amendment to the list of capital improvements and to proposed attendance zones, in which plaintiffs deleted from the May 30, 1973, petition a request for approval for an Interstate 40 West comprehensive high school, and substituting a plan for an inner city comprehensive high school, and modified the proposals relating to Antioch, Dupont, and Bellevue high schools. On July 6, 1979, the Court granted the defendants' amendment to their request for approval of certain building projects, in which defendants withdrew their request for approval of construction of Antioch High School, the Glengarry Elementary School project, the Jordonia-Wade Elementary School project, and omitted the projects proposed for Dupont and Bellevue high schools.

8. August 7, 1979: Plaintiffs' motion for contempt, which charged that defendants had violated the Court's order directing defendants to terminate the optional transfer plan, discussed *infra.*

In pretrial conferences held with all parties, the Court divided the matters into four phases:

Phase 1: Historical recapitulation of school integration since the order of 1971; consideration of the Long Range Plan of the school board; consideration of the proposed zoning for school year 1978—79 (now moot since the year 1979—80 was only one month away at the time of the hearing); consideration of the Board's request to proceed with certain construction projects.

Phase 2: Consideration of matters relating to racial mix of staff and faculty.

Phase 3: Consideration of all petitions for contempt.

Phase 4: The matter of attorneys' fees.

The Phase 1 hearings began on June 26, 1979, and continued on June 27, 28, 29, 30, 1979, and July 2, 3, 5, and 6, 1979. The proof on Phase 1 overlapped substantially with the matters of Phase 3.

At the conclusion of this hearing, the Court directed the defendant, Board of Education, to reconsider its entire plan assuming no parameters heretofore ordered by the Court, but with the primary objective of the achievement of a unitary school system for the entirety of Davidson County. In addition, the Board was instructed to consider: maximum utilization of existing buildings (specifically including those in the inner city); economic factors of transportation costs and fuel economy; time and distance involved in transportation; and any other factors which would impact upon the ultimate objective of a quality educational opportunity for all children in Davidson County through a unitary school system.

The defendant Board has advised the Court that the foregoing request of the Court is a massive undertaking which, if approved by the Court, will represent a substantial redrawing of zone lines and transfer of numerous students.

From the proof adduced on Phase 1 of the hearings, the Court finds the following:

1. The perimeter line drawn by the Court in 1971, by which no requirement of either transportation or attempts at racial balance was mandated outside the perimeter, has encouraged white flight to the suburbs and to those school zones unaffected by the 1971 order. The combined effect of the order and the flight therefrom, either to suburban public schools or to private schools, has been:

a) that inner city schools have become progressively resegregated;[5]

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[5] The most dramatic example of such resegregation can be seen in enrollment statistics for Pearl High School for the school years 1970—71 through the projections for 1979—80, compiled in Exhibit 87, as follows:

	Black Students/ Percentage Black	White Students	Total Students
1970-71	1212 (100.0)	0	1212
1971-72	599 (62.9)	353	952
1972-73	603 (66.4)	305	908
1973-74	594 (68.4)	274	868
1974-75	558 (74.7)	188	746
1975-76	551 (72.5)	208	759
1976-77	551 (75.8)	175	726
1977-78	492 (83.1)	100	592
1978-79*	577 (96.6)	20	597
Projection			
1979-80	532 (96.6)	19	551

*9th Grade Added

b) that the projected ideal ratio of 15 percent to 35 percent black population in each school has become increasingly more difficult to meet;

c) that the school facilities outside the Court-ordered perimeter have become increasingly inadequate to accommodate the growing student bodies.

2. The resegregation, resulting, at least in part, from the nonetheless good faith efforts of the School Board in the implementation of the Court's order, amounts to a *de jure* segregation.

Recognition of the above results impels a complete reexamination of the remedy fashioned in 1971. As the United States Supreme Court has said,

> The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. . . . Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed. . . .

Green v. *School Bd. of New Kent County,* 391 U.S. 430, 439, 88 S.Ct. 1689, 1695 20 L.Ed.2d 716, 724 (1968). *See also Swann* v. *Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 19-21, 91 S.Ct. 1267, 1278—79, 28 L.Ed.2d 554, 569—70 (1971).

[1] Although any delay in achieving an adequate remedy to a situation in which Davidson County children are deprived of constitutional rights is distasteful, the alternatives and the most appropriate remedy among such alternatives have not yet been the subject of proof in this case at this time. The Court is therefore left with the equally untenable choices of a further year's delay or a haphazardly hurried construction of partial patches which would undoubtedly worsen the situation. The problem faced by the parties in this suit, by this Court, and by

the citizens of this county is of paramount importance. It deserves the best efforts at resolution that can be mustered by everyone concerned. It is a subject upon which the best minds available to the parties, including input from the many well-motivated, thoughtful citizens of the community, should be sought and received. The 1979-80 school year is less than a week away. Massive restructuring of zones at this time would be chaotic. For all of these reasons, delay, however undesirable, becomes the only option available to the Court. The proposed zones of the Board for the year 1978—79 are approved for use in 1979—80. Over the coming year, this Court will hear from the parties, and invites amicus briefs by groups such as the Citizens Advisory Committee, Parent-Teacher groups, and any other interested group. The Court encourages such groups to submit proposals which are designed to achieve a unitary school system in Davidson County and to provide the best possible educational opportunity for all of the school children of the county.

The Optional Transfer Policy

In 1978 the School Board adopted a transfer policy which permitted any student assigned to a non-comprehensive high school to opt out automatically of such school to a comprehensive high school (Exh. 21). At the July hearings, it became evident to the Court that this provision had been utilized extensively by white students assigned to Pearl to escape such assignment. The percentage of automatic options out of Pearl compared to those from other non-comprehensive high schools leaves no other credible inference.[6] The effect of this policy upon the already-established trend toward resegregation at Pearl was disastrous. From the 1977—78 school year to the 1978—79 year, the black to white ratio went from 83.1 percent to 96.6 percent (Exh. 87).

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[6] Exhibit 20 itemizes the number of students who transferred to a comprehensive high school from non-comprehensive high-schools in 1978-79 under the optional transfer program. Interpolating these figures to reflect the number of students transferring from Pearl and other non-comprehensive high schools to comprehensive high schools, the resulting chart is as follows:

At the hearings in July, when the foregoing facts became apparent, the Court orally enjoined the Board of Education from further implementation of this transfer policy. The Court's directive from the bench was:

School	White	Black	Other	Total
From Pearl	290	21	12	323
to Glencliff	34	0	0	34
to Hillsboro	35	10	2	47
to Hillwood	220	8	10	238
to Overton	1	3	0	4
From Antioch	62	5	0	67
to Glencliff	62	5	0	67
From Apollo Jr.	50	1	0	51
to Glencliff	50	1	0	51
From Bellevue	8	0	0	8
to Hillsboro	8	0	0	8
From Cohn	66	19	0	85
to Hillsboro	31	14	0	45
to Hillwood	35	5	0	40
From Madison	47	2	0	49
to Maplewood	1	0	0	1
to Whites Creek	46	2	0	48
From Dupont (Jr. & Sr.)	37	4	0	41
to McGavock	37	4	0	41
From East	10	3	0	13
to Stratford	10	3	0	13
From Goodlettsville	68	5	0	73
to Whites Creek	68	5	0	73
From Joelton	149	0	0	149
to Whites Creek	149	0	0	149
From Neely's Bend	3	0	0	3
to Whites Creek	3	0	0	3
Total	790	60	12	862*

*Exhibit 20 also reflects that 11 white students transferrred from Hillsboro to Hillwood. Since those transfers are not from non-comprehensive schools to comprehensive high schools, they are not listed in the above chart.

> I am making this ruling now, Mr. Willis, because as I see the urgency of the situation that has arisen during the course of the proceedings, I think I need to do that because you need to know what I am deciding on in the 1978—1979 [sic][7] school year. I think it is going to take considerable work by the School Board on this ruling because it is going to move several hundred students or determine from them whether or not there is a bona fide reason for program transfers and in anticipating it on a program transfer basis rather than an automatic opting out. So, I am telling you that now, so you have plenty of time to work on it, we will continue to do that as we can through this hearing. I will supplement all of this in a written memorandum and give you a chance for appeal and whatever. When I see something I need to address in order to be ready for the 1978—1979 [sic] school season, I will address it.

Thereafter, on August 7, 1979, plaintiffs filed a petition for contempt alleging that the Board had failed to implement in good faith the Court's order. This petition was scheduled for the first order of business at the resumed hearings which began August 21 and continued through August 24, 1979.

From information provided through discovery, plaintiffs introduced statistical summaries of transfers approved, broken out by sending school, receiving school, and by race (Exh. 98). From this exhibit it appears that 326 white students have had transfers approved from Pearl to other high schools in the system. Sixteen blacks and twelve persons of other races were granted transfers from Pearl. All of the transfers from Pearl were subject matter based. The number of transfers from other non-comprehensive high school were:

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[7] The Court erroneously referred to the school year 1978—79. The Court, of course, intended to refer to the school year 1979—80.

	White	Black	Other
From Joelton	134	0	0
From Cohn	85	25	2
From Antioch	38	1	0
From Dupont Sr.	32	0	0
From Madison	31	3	0
From Goodlettsville	23	8	0

The impact of these transfers upon the racial mix at Pearl was dramatic. Children assigned to Pearl by applicable residential zones should have produced a racial mix of:

532 white (52%)

36 other (3%)

461 black (45%)

After the approved transfers were granted, the resulting totals and percentages were:

206 white (30%)

24 other (4%)

445 black (66%)

Additional transfer requests are pending from Pearl of 78 white, 17 black, and 4 other (Exh. 142). If these transfers are approved, the white population will be reduced to 22 percent.

The apparent mass exodus of white students from Pearl under the subject matter transfer raised a serious question in the Court's mind as to the extent of monitoring which defendant Board had exercised in its implementation of the spirit if not the letter of the Court's enjoinder from the bench in July. From the statistical evidence above, the Court found a prima facie case of contempt to have been made and shifted the burden of going forward with the evidence to the defendants.

The School Board explained its procedure in implementing the court's order as follows:

1. The School Board was informed at its July 10 meeting of the Court's order and the need for modification of the Board's policy.

2. The Board at its July 24 meeting rescinded its optional transfer policy. Dr. Elbert Brooks, Director, Metropolitan Schools, stated to the Board that "students who had made these automatic transfers would be assigned to their original zoned school but would be permitted to request a transfer in order to take a particular program/subject not offered at the student's assigned school."

3. A form letter was developed and signed by Dr. Brooks and sent to all students who for the school year 1978—1979 had been assigned to a non-comprehensive high school under the "automatic option" policy (Exh. 96).

4. A Transfer Committee was established consisting of Mr. Joe Garrett, Chairman, Pupil Accounting and Transfers, Pupil Personnel Services; Dr. Cornell Lane, Psychology, Pupil Personel Serivces (a black member); Mr. Bill Hollingsworth, Attendance, Pupil Personnel Services; and Mr. Dan Covington, Vocational and Technical Education. A directive was issued by Dr. Brooks requiring that requests for transfer be forwarded to the office of Mr. Garrett for review by the Transfer Committee. After such review the two affected principals and the students were to be notified.

5. Principal Carnes of Pearl High testified he was informed at two meetings held with other principals and his district superintendent that his sole function was to determine if the requested course was available at his school and, if not, to sign off on the request. This instruction was reiterated by Dr. Brooks in a phone call after a school board member relayed parent com-

plaints to Dr. Brooks about Mr. Carnes' handling of transfer requests. Somewhat inconsistently, the testimony also showed that Mr. Carnes understood and Dr. Brooks also reiterated to him his responsibility to counsel with the student and parents concerning such a transfer.

At some point after the transfers began to be requested, the form for such applications was changed. The material change was the deletion of an addendum which listed courses taken in the previous year, grades received, and courses desired this year. It also required a statement that the program of studies had been discussed with both the principal and guidance counselor and an explanation thereof. Finally, it required a selection of a course not offered at the assigned school and a statement of how the requested course would be beneficial to the student. No satisfactory explanation of the changes in the form was offered by defendants.

Notably after the fact, after the filing of the petition for contempt, Dr. Brooks required a comparison of the subject/program transfers granted with the students preregistration desires indicated last spring (Exh. 137). This comparison as it relates to transfers from Pearl reveals the following:

Transfer Requests for Programmatic Reasons Approved by Student Transfer Committee
Metropolitan Nashville Public Schools
As of August 16, 1979

Spring Preregistration Course Selections Compared to Fall Registration Course Selections (Reason for Transfer Request)

Sending School	Receiving School	Number Approved				Fall Course Selection Same As Spring Selection				Fall Course Selection Not Selected in Spring, But Spring Selection Not Offered at Sending School				Fall Course Selection Not Selected in Spring, Spring Selection Similar to Course Offered at Sending School				All Courses Selected in Spring Offered at Sending School				Number Spring Schedule Available
		B	W	O	T	B	W	O	T	B	W	O	T	B	W	O	T	B	W	O	T	
Pearl	Hillsboro	2	45	2	49	1	25	0	26 (53.1%)	1	7	0	8 (89.4%) (16.3%)	0	0	0	0	0	11	2	13 (26.5%)	2 (4%)
Seniors																						
Others	- 2																					
Black	- 0																					
White	- 9																					
Total	- 11 (22.4%)																					
Pearl	Hillwood	5	170	10	185	1	103	4	108 (58.4%)	1	55	3	59 (90.3%) (31.9%)	0	0	0	0	0	13	1	14 (7.6%)	4 (2.2%)
Seniors																						
Others	- 2																					
Black	- 0																					
White	- 37																					
Total	- 39 (21.1%)																					
Pearl	Glendiff	1	94	0	95	0	42	0	42 (44.2%)	0	54	0	54 (80.0%) (35.8%)	0	1	0	1 (1.1%)	1	10	0	11 (11.6%)	7 (7.4%)
Seniors																						
Others	0																					
Black	0																					
White	19																					
Total	19 (20.0%)																					

It is apparent from this summary that 69.4 percent of the transfers from Pearl to Hillsboro, 90.3 percent of the transfers from Pearl to Hillwood, and 80 percent of the transfers from Pearl to Glencliff were facially *bona fide* under the policy of the Board and the understanding of Dr. Brooks, discussed *infra*. In the case of the one white transfer from Pearl to Glencliff wherein the fall course selection was not selected in the spring, and the spring selection is similar to a course offered at the sending school, and in the case of those 38 transfers to comprehensive high schools in which all courses selected in the spring are offered at Pearl, the transfers are facially suspect.

Dr. Brooks testified that a follow-up interview will be scheduled with each of these individuals in the suspect category in an effort to determine the *bona fides* of the students' expressed desires. Such a monitoring is consonant with the policy adopted in 1977 by the Board in Section IV(F)(4) of the Student transfer Policy # 5119: "Special requests having evidence of course or program selection and changes in courses scheduled for the purpose of *school reassignment* will not be approved" (emphasis added).

Dr. Brooks further testified that, in his opinion, there is no reliable way to explore the legitimacy of a subject/program tranfers except after the fact. In pursuance of this belief, the chairman of the Transfer Committee developed a three-part monitoring plan, to which Dr. Brooks added a fourth, by which the Board will follow the progress of each transfer student in the requested courses (Exh. 139). Actual enrollment is to be verified and progress checked at six-week and semester intervals and evaluated for renewal of transfer.

The Board's actions before the filing of the contempt petition leaves much to be desired. Dr. Brooks admitted in hindsight that the comparison with spring course selection should have been examined before the fact rather than after. The Court

believes that the use of the longer form, changed in midstream apparently in the interest of time, would have produced information for a more objective evaluation of the *bona fide* nature of the application for tranfer.

The statistical evidence of transfers of white students from Pearl gives rise to the inescapable inference that white students, given the opportunity to automatically opt out of the Pearl zone last year, certainly did not wish to return. Perhaps many of these represent legitimate desires to attend a comprehensive high school and take courses offered there but not at Pearl. Black children are not exercising this program/subject opportunity in nearly the equivalent numbers or percentages, however. This may be due in part to a corresponding desire by black students to attend a majority black school; it may be related to the ethnic pride of the black community in Pearl High as an institution. For whatever reason, it is a fact evidenced by the admitted statistics of both 1978—79 and 1979-80 transfers.

The Board has adopted, as a part of its long range plan of construction of comprehensive high schools, a plan to construct an inner city comprehensive high school, to be named Pearl, and at a location either on the present site or at some place in the North Nashville area. Originally, the Board had gone forward with the recommendation of the staff for the closure of Pearl, Cohn, and Joelton high schools upon the theory that none of these locations fit into the judicially imposed directive to locate comprehensive high schools in areas which would encourage and facilitate an integrated school system. Objections by the black community to the closure of Pearl brought about a reversal of this decision within the past year.

Another factor which has impinged upon the School Board's action in regard to Pearl, as well as other non-comprehensive high schools in the system, is the requirement by Tennessee law that all students in grades nine through twelve be given access to

a comprehensive high school education by 1978 (T.C.A. §§ 49-2701 *et seq.*). As long as Pearl and other non-comprehensive high schools were either scheduled for closure or had not yet been converted to a comprehensive facility, the Board felt obligated to provide the "automatic option," or at least the program/subject option on an "as required" basis.

The subject matter/program transfer plan was "loosely conceptualized and leniently administered." (Testimony of Dr. Scott). The Board of Education did not follow it own policies relating to subject matter transfers, specifically Sections IV(A) and IV (F) of the Student Transfer Policy # 5119. No preapproval screening was done to determine how the requested subject fit into a student's career objectives. No effort was made to ascertain if the requested subject correlated with the student's career objectives expressed at spring registration or if, in fact, any change had taken place in those career objectives by the fall registration. No guidance counseling input was sought or received before approval was granted. Transfer approval was automatic if the requested course was not offered at the sending school and if such course was not already full at the receiving school. No effort was made to tabulate course requests and to determine if a sufficient demand existed to establish the requested course as an offering at the sending school. For instance, in applications to transfer away from Pearl, there were at lease 38 requests for horticulture, 18 requests for German history, 38 requests for media arts, 34 for computer programming, and 22 for vocational cluster. Such numbers would seem sufficient to establish classes in these subjects at Pearl. It would have been both feasible and reasonable to include a question on the request for transfer form inquiring whether or not the student would be willing to take the requested course at Pearl if it were offered there after a sufficient expression of interest. Such an inquiry was not made.

The looseness of the administration of the subject matter/program transfer policy and its pro forma approval can have no other effect than to emasculate any efforts at desegregation. Zoning becomes a farce under the expressed attitude of Dr. Brooks as to his understanding of a student's automatic right to course offerings at another school. Many of these courses have no relationship whatsoever to the vocational program outlined in T.C.A. §§ 49—2701 et seq. As this Court reads that law, the variety of vocational offerings in the Metropolitan School System is not required to be duplicated at every school nor is every student required by this law to be given access to every course at every school.

[2] The Court finds that the school board policy for subject/program transfers, although racially neutral on its face, by the manner in which it has been implemented and the inherent potential for abuse in its conceptualization, has a negative impact upon the desegregation efforts of the School Board pursuant to the previously issued order of this Court, and violates the spirit of the 1971 order, and the spirit of the order of this Court issued orally on July 2, 1979.

[3] The Court, however, does not find defendants in contempt of the July 2, 1979, order of this Court. In that order, the Court directed defendants to abolish the optional transfer plan. It is indisputable that defendants complied with that order. In the July 2, 1979, order the Court did not deal specifically with the subject matter/program transfer plan, which was the central issue of the recent hearing. As the Court of Appeals for the Sixth Circuit has recently held, "The notice of a judicial order upon violation of which a contempt finding may properly be based is such notice as would clearly tell a reasonable person what he is required to do or abstain from doing." *Reed* v. *Cleveland Bd. of Educ.*, 607 F.2d 749, 752, (6th Cir. 1979). It would violate due process to hold defendants herein in con-

tempt for their implementation of the subject matter/program transfer plan when the Court did not address the matter with that degree of specificity necessary under the standard hereinabove set out.

[4] It is, therefore, ORDERED that:

1. The School Board reexamine and submit to this Court for approval by September 7, 1979, a revision of its subject matter/program transfer policy designed to provide methods by which transfer applications may be objectively judged prior to approval, to determine their validity in the educational objectives of the individual student as opposed to a subterfuge on the part of a student to escape a given school or subvert the zones established for the purpose of achieving a unitary school system.

2. The School Board shall conduct a review of each of the transfer applications that have been heretofore approved as well as those now pending. Such a review will include an interview with both the student and parent or guardian. After such review, the Board will make written findings in each case of the validity of the request. A procedure will be established to obtain the recommendation of the principals from the sending and receiving schools and the judgment of the transfer committee. Such a procedure will also make provisions for an appeal to the Director. The decision of the Director, on appeal, shall be in writing and shall include the supporting reasons for his decision. Such a review of all previously granted requests will be made by September 7, 1979. The defendants will give first priority to reviewing those previously granted requests for transfers out of Pearl High School.

3. By September 7, 1979, the School Board shall submit to the Court for its approval recommendations relating to a plan to establish additional classes at Pearl and/or other non-

comprehensive high schools when the number of requests for transfers from such sending schools are sufficient to justify the establishment of such classes. This order does not suggest or require the conversion of all high schools into comprehensive high schools. The Board will necessarily make value judgments between establishing courses such as computer sciences or vocational clusters, on the one hand, which may not be economically feasible to develop at, for example, Pearl, and establishing courses such as German history, horticulture, and guitar, which would not require mass expenditures if such courses were offered at Pearl.

4. Those students whose requests for transfer have been heretofore approved will register at and begin attending the school to which they requested to be transferred. The School Board shall reassign to the schools to which the students were originally zoned those students whose requests for transfer the transfer committee and/or the Director finds to be less than *bona fide* and reassign to the original zoned school those students who requested a course subsequently offered at that school, under paragraph three of this order.

5. Those students whose requests for transfer are pending and those students who have not yet requested transfer will register at and attend the school to which they were originally zoned until such time as the defendants evaluate their requests for transfer under the revised plan.

6. Pursuant to the order and memorandum, filed August 27, 1979, the defendant Board may grant the application of any senior (as defined in that memorandum opinion), who requests transfer from a high school to which he is zoned to the high school to which he attended as a junior in the year 1978—79.

The Court does not intend to alter the provision of the 1971 Court order, incorporated in Section XI of the Board's policy §

5119 (Exh. 21), that allowed students to transfer from "majority to minority" schools. Such provision has previously permitted a student, who is a member of the majority race in a particular school, to transfer automatically, without a program related reason, to the closest school in which that student would be a member of the minority race. The Court, however, will not condone transfers from, for example, Pearl, by white students in grades nine through eleven, when the effect of such a transfer will be to convert the majority at the sending school into a minority, or convert the minority at the receiving into a majority. The Board shall allow any student to transfer from a school in which he is *presently* in a majority to any school in which he would be *at that time* a member of a minority, in accordance with the defendants' previous majority to minority plan. If, however, by the operation of the revised transfer plan and/or the majority to minority plan, the racial mix is altered so that a student in grades nine through eleven would not be transferring from a school in which he is presently a member of a majority to a school in which he would be at that time a member of a minority, the majority to minority rule will not justify approval of a request to transfer.

The Court recognizes that the foregoing directives are temporary and will be obviated by the completion of the comprehensive high school program.

MEMORANDUM

[5] Defendants have moved this Court to exclude those students who will be seniors in the year 1979—80 from the Court's order of August 24, 1979, relating to subject matter/program transfers. Plaintiffs have responded in opposition to defendants' motion.

In her affidavit attached to defendants' motion, Dr. Peggy Harris, research assistant for defendant Board of Education, states that the sixty-six white students, designated as seniors for

the year 1979—80, have requested and been approved for transfer from Pearl to a comprehensive high school. This figure represents approximately 20 percent of the 326 white students in grades nine through twelve, originally zoned to Pearl, whose requests for transfers out of Pearl have been approved (Exh. 98): In addition, Dr. Harris stated that there were presently thirteen requests for transfer out of Pearl from white seniors whose applications were pending decision by defendant Board.

In defendants' motion, they note the testimony elicited at the recent hearing from Leslie Carnes, Principal of Pearl High School, and Dr. Elbert Brooks, Director of Metropolitan Schools, regarding the special status of seniors who may have bought senior rings and made plans to participate in athletic and extracurricular activities. Plaintiffs, however, point out that the problems of seniors were not the subject of extensive proof at the hearings. They, therefore, argue that the special situation of each senior should be evaluated by the defendant Board on an individual basis when the Board reconsiders its prior grant of approval of transfer requests and initially considers pending transfer requests. Although plaintiffs contend that it is not equitable to permit those who have achieved a wrongfully acquired status to profit from such status, they also appear to be sensitive to the potential special needs and problems of seniors.

This Court has found that the previously utilized optional transfer plan and the Board's recent implementation of the subject matter/program transfer plan had a debilitating effect on desegregation efforts in this school system. Toward the end of halting the rapid trend of reversion to an almost totally black inner city school, the Court ordered that the optional transfer plan be terminated and the method by which the program transfers were granted be radically revised so that program transfers could be based on *bona fide* educational reasons rather than on a means to escape a traditionally black, inner city school.

The Court has attempted to fashion a remedy that will eliminate the negative effects of the previous policies of defendant Board. In fashioning such a remedy, however, it is the Court's responsibility to balance the relative detriments and benefits to the school children, who will be affected by the Court's order. The Court cannot decree in a theoretical void; it must be cognizant of the specific situations involved and the harm that may befall individual children. The Court is not insensitive to the special status of high school seniors who have made plans according to the assumption that they would be attending the same school for their last year as they attended their junior year. Such plans may have entailed expenditure of money for class rings and senior pictures, and a commitment to participate in, *inter alia,* athletic and band activities, school clubs, and student government. To destroy a student's plans for the last year of high school and to wrest him away from the school he has known and the friendships he has developed has the potential for thwarting a child's academic and social adjustment and fulfillment of his educational goals. To uproot a child who has spent at least the last year in anticipation of completing his high school education in the same environment offends this Court's sense of justice. The potential harm in such upheaval weighs heavily in favor of an exclusion for seniors from the revised transfer plan.

The Court, therefore, grants defendants' motion to exclude seniors from the Court's order of August 24, 1979. The Court will permit the defendant Board to grant the application of any senior who requests transfer from a school to which he attended as a junior in the year 1978—79. The Court adopts the definition of "senior" used by defendants as any student who, based on his number of credit hours, is capable of graduating from high school during the regular school year of 1979—80 plus the summer school term of 1980. An exemption for seniors will be incorporated into the final version of the Court's order of August 24, 1979. This order of exemption of seniors from the revised program transfer plan will be in effect only for the year 1979—80, and will not be extended beyond that year.

APPENDIX C

Robert W. Kelley, Individually and
representative of the class

v.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee, et al.

Henry C. Maxwell, Jr., Individually
and representative of the class

v.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee, et al.

Nos. 2094, 2956.

United States District Court,
M. D. Tennessee,
Nashville Division.

May 20, 1980.

In a school desegregation case, the District Court, Wiseman, J., held that: (1) the desegregation plan proposed by the Board of Education, which recommended more busing to achieve more racial balance, would be rejected, because it placed most of the burden of achieving desegregation on young black children and might lead to a public school system serving only the lower social or economic segments of society, and (2) the Board should consider a plan such including features as neighborhood schools for kindergarten and lower elementary grades, a minimum presence of at least 15 percent of the race in the minority at middle schools, the use of magnet schools, the use of public transportation, and educational components to improve the opportunity of school children for intercultural experiences.

Judgment accordingly.

See also D.C., 479 F.Supp. 120.

1. Schools (key) 13(4)

Once finding has been made that racially discriminatory dual school system has been maintained, it is responsibility of school board, under supervision of district court, to achieve unitary school system.

2. Schools (key) 13(6)

In determining remedy for school segregation, effectiveness of proposed desegregation plan must be weighed against other available alternatives and each alternative must be assessed in terms of its relative costs.

3. Schools (key) 159½

Desegregation plan proposed by the Board of Education, which recommended more busing to achieve more racial balance, would be rejected, because it placed most of the burden of achieving desegregation on young black children and might lead to public school system serving only lower social or economic segments of society.

4. Schools (key) 13(12)

Board of Education should consider desegregation plan including features such as neighborhood schools for kindergarten and lower elementary grades, minimum presence of at least 15 percent of race in minority at middle schools, use of magnet schools, use of public transportation, and educational components to improve opportunity of school children for intercultural experiences.

Avon N. Williams, Jr., Richard H. Dinkins, Nashville, Tenn., Plaintiffs Intervenors, Carrol D. Kilgore, William E. Higgins, Nashville, Tenn., for plaintiff.

William R. Willis, Jr., Marian F. Harrison, Nashville, Tenn., for defendants.

MEMORANDUM OPINION

WISEMAN, District Judge.

The present posture of this case and this Court's action thereon require a recitation of the tortuous twenty-five-year history of desegregation efforts in Metropolitan Nashville.

I. HISTORY OF NASHVILLE-DAVIDSON COUNTY DESEGREGATION PRIOR TO 1971

On September 23, 1955, plaintiff Robert W. Kelley filed this class action lawsuit to enforce *Brown* v. *Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), decided the previous year, and to enjoin the defendant Board of Education of the City of Nashville from continuing to operate a segregated school system. A three-judge court was convened in this district,[1] but, upon defendants' concession that the law was unenforceable under *Brown,* the three-judge court was dissolved for lack of jurisdiction and the case remanded to a single district judge of this Court. *Kelley* v. *Board of Educ.,* 139 F.Supp. 578 (M.D.Tenn. 1956).

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[1] The three-judge court was convened pursuant to 28 U.S.C. § 2281, since plaintiffs contested the constitutionality of Tennessee law mandating segregation, T.C.A. §§ 49-3701 to 49-3704. These statutes, enacted in 1901, prohibited interracial schools and the teaching of interracial classes. Misdemeanor penalties were prescribed for violation of this law. Section 49-3701 provided that "[i]t shall be unlawful for

After a hearing on the proposed plan for desegregation submitted by the defendant Board, the Court, on January 21, 1957, approved the plan insofar as it provided for desegregation for grade one in the year 1957-58, but ordered the Board to develop a plan to eliminate segregation in the remaining grades. *Kelley* v. *Board of Educ.*, 2 Race Rel.L.Rep. 21 (M.D.Tenn.1957). On February 18, 1958, this Court rejected as unconstitutional the Board's proposed plan, essentially modeled after the Parental Preference Law, T.C.A. § 49-3704,[2] passed in January of 1957, and previously held unconstitutional by this Court in *Kelley* v. *Board of Educ.*, 2 Race Rel.L.Rep. 970 (M.D.Tenn.1957). The proposed plan proscribed mandatory integration or segregation in any grade but permitted parents to choose between sending their children to a one-race or integrated school. The Court allowed the defendant Board two months to file another plan

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any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning." Acts 1901, ch. 7, § 1; Shann., § 6888a37; Code 1932, § 11395. Correlatively, section 49-3702 provided as follows:

> It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent, or procurement.

Acts 1901, ch. 7, § 2; Shann., § 6888a38; Code § 11396.

[2] Section 49-3704 read as follows: "Separate schools authorized.—Boards of education of counties, cities and special school districts in this state are authorized to provide separate schools for white and Negro children whose parents, legal custodians or guardians voluntarily elect that such children attend school with members of their own race." Acts 1957, ch. 11, § 1.

for desegregation of all grades.[3] *See Kelly (sic)* v. *Board of Educ.*, 159 F.Supp. 272 (M.D.Tenn.1958). On June 19, 1958, this Court approved the proposed Board plan that provided for elimination of compulsory segregation in grade two as of the academic year 1958-59 and in one additional grade a year therafter. *See Kelley* v. *Board of Educ.*, 3 Race Rel.L.Rep. 651 (M.D.Tenn.1958), *aff'd*, 270 F.2d 209 (6th Cir.), *cert. denied*, 361 U.S. 924, 80 S.Ct. 293, 4 L.Ed.2d 240 (1959).[4]

At the time *Kelley* v. *Board of Education* was filed, Davidson County, surrounding Nashville, and the City of Nashville maintained separate school systems. Because the *Kelley* order had no effect upon the county school system, which continued to operate as a segregated system, plaintiff Henry C. Maxwell, Jr., filed a class action complaint on September 19, 1960, which paralleled the complaint previously filed by plaintiff Kelley against the Board of Education of the City of Nashville. On November 23, 1960, this Court approved a gradual desegregation plan submitted by defendant County Board of Education but modified the proposed one-grade-a-year component to require that immediate desegregation take place in grades one through four with an additional grade each year in the future. By so ordering, the Court placed the county school system on the same grade-a-year basis as the city school system. *See Maxwell* v. *County Bd. of Educ.*, 203 F.Supp. 768 (M.D.Tenn.1960), *aff'd*, 301 F.2d 828 (6th Cir. 1962), *aff'd in*

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[3] At the same time, the Court denied defendants' motion to dismiss that was grounded on the adequacy of the administrative remedy provided in the Pupil Assignment Act, also enacted in January of 1957. *See* Pub.Acts 1957, cc. 9-13.

[4] Plaintiffs appealed from the Court's order because they asserted that *Brown* mandated that desegregation be achieved with more celerity than one grade per year. Defendants, on the other hand, appealed the Court's ruling that the portion of the plan that implemented the Parental Preference Law was unconstitutional.

part, rev'd in part, sub nom. Goss v. *County Board of Educ. of Knoxville,* 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963).[5]

On September 10, 1963, after the City of Nashville and Davidson County merged into a metropolitan government, the *Kelley* and *Maxwell* cases were consolidated by consent order and the Board of Education for Metropolitan Nashville-Davidson County was substituted as defendant.[6] The case has remained in the same posture since 1963, with the primary defendant being the Metropolitan County Board of Education of Nashville and Davidson County. No significant action was taken by this Court in regard to school desegregation until over six years later.[7]

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[5] The plan, as approved by this Court and affirmed by the Court of Appeals, included a minority-to-majority transfer option for students who would otherwise be zoned to schools in which they would be in a racial minority. This provision is the converse of the majority-to-minority transfer policy *currently* in effect in Nashville-Davidson County. The United States Supreme Court granted certiorari to decide the constitutional validity of the minority-to-majority transfer provision of the school plan for Knoxville, Tennessee, as approved by the District Court for the Eastern District of Tennessee, *Goss* v. *Board of Educ.,* 186 F.Supp. 559 (E.D.Tenn.1960), and affirmed by the Court of Appeals for the Sixth Circuit, *Goss* v. *Board of Educ.,* 301 F.2d 164 (6th Cir. 1962), as well as such policy included in the *Maxwell* plan. The Supreme Court reversed, holding that the minority-to-majority provision of both plans was constitutionally defective. *Goss* v. *Board of Educ.,* 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963).

[6] The 1963 consent order substituted the Transitional Board of Education for the Metropolitan Government of Nashville and Davidson County as defendant. By order of December 3, 1964, the Metropolitan Board of Education and its board members were substituted for the Transitional Board.

[7] In the interim, the plaintiffs challenged an action taken by the defendant school board and the state secondary athletic association, which had suspended a predominantly black, inner city school from participation in the interscholastic athletic program. The Court ruled that due process had been denied in the procedure used for suspending the school. The Court did not, however, deal with any aspects of the pupil assignment portion of the desegregation plan. *See Kelley* v. *Board of Educ.,* 293 F.Supp. 485 (M.D.Tenn.1968).

Upon plaintiffs' motion for injunctive relief, this Court, on November 6, 1969, issued a temporary restraining order, enjoining defendant Board from purchasing new school sites, building new school facilities, or expanding existing school facilities, until a hearing on the motion. After such hearing, the Court, on July 16, 1970,[8] enjoined the Board from school construction not commenced as of the date of the restraining order, and ordered that the Board devise a comprehensive plan for a unitary school system that included, *inter alia*, rezoning and school construction to maximize school integration. *Kelley* v. *Metropolitan County Bd. of Educ.*, 317 F.Supp. 980 (M.D.Tenn.1970). The defendant submitted a plan as ordered, but, on August 25, 1970, the Court effectively stayed its order until resolution by the United States Supreme Court of school desegregation cases then pending before it.[9] On December 18, 1970, however, the Court of Appeals for the Sixth Circuit vacated the stay and reinstated this Court's order. *Kelley* v. *Metropolitan County Bd. of Educ.*, 436 F.2d 856 (6th Cir. 1970).

II. THE 1971 COURT ORDER

Pursuant to the remand order of the Court of Appeals, this Court held hearings on the Board's proposed revised plan in the spring of 1971. At such hearings, a plan was submitted by the Board, a plan by the plaintiffs, including alternate plans for the elementary schools, and two alternate plans submitted by the Department of Health, Education, and Welfare [HEW], acting as consultant to the Court. The Court rejected defednants' pro-

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[8] The opinion was issued on July 16, although the judgment was not entered until August 13, 1970.

[9] The most significant case involved was *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

posal, calling it a "mere tinkering with attendance zones," and "only a token effort." *Kelley* v. *Metropolitan County Bd. of Educ.*, Nos. 2094, 2956, at 6 (M.D.Tenn. June 28, 1971).[10]

The Court similarly rejected both of plaintiffs' proposals because they allowed the school board to determine the actual assignment of pupils and implementation of the plan. In light of the Board's past actions and apparently half-hearted efforts to devise a unitary school system that would encourage integration, the Court was naturally reluctant to delegate to the Board the responsibility for specific implementation. Additionally, the Court rejected the elementary school plans proposed by plaintiffs because they included some schools in the periphery of the county. The Court at that time found that the distances involved and the attendant busing costs were so great that it was not feasible to include the outer reaches of the county in a comprehensive busing plan.[11]

The Court did adopt the element in both plaintiffs' and defendants' plans that instituted an "ideal student racial ratio" in the range of 15 to 35 percent black in each school. After rejecting both plaintiffs' and defendants' plans, the Court viewed the HEW plan, as amended after evidence adduced at the hearings, which incorporated geographic zone changes, clustering,

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[10] Although the opinion was issued by this Court, it is impossible to refrain from commending my predecessor on this case, now Chief Judge L. Clure Morton, for an opinion that was remarkable not only in its portrayal of courage by its author in light of the certain community hostility that ensued but also for its forthrightness and clarity in treating the legal mandates and decreeing specific directives and proscriptions.

[11] Noting that the "practicality and feasibility of a plan is a material consideration," the Court made it clear that the litmus test for a unitary school system was not necessarily the integration of each school within the system. *Id.* at 8.

contiguous and noncontiguous pairings, and grade restructuring, as the "only realistic plan remaining." *Id.* at 8. Perhaps most significant in terms of its total impact on the school system, the Court, in an effort to insure a racially unitary school system, ordered that over 13,000 more students be transported in the 1971-72 school year than had been bused in the previous year. *Id.* at 4-5.[12] Under the pupil assignment plan as submitted by HEW and adopted by the Court, no school would have a majority of black students.

To discourage future resegregation, the Court made specific orders designed to maximize the potential for an integrated system. Included in the Court's order was a directive for the Board to implement a majority-to-minority transfer policy. The Court also approved the proposed construction of what was later built as the Whites Creek Comprehensive High School because of its proximity to the proposed inner city expressway loop, located approximately half-way between predominantly black and white residential populations. The Court enjoined the construction of the proposed Goodlettsville Comprehensive High School because it would be located in an all-white community and not in proximity to the line of demarcation between the two populations. The Court similarly denied the Board permission to enlarge Hillsboro High School, located in a white community, into a comprehensive high school, enjoined the use of portable classrooms for any purpose other than integration, and, finally, although exempting the predominantly white schools in the outer county from the effect of busing, enjoined the Board from renovating or enlarging by either construction or use of portables any schools that serve less than 15 percent black students after implementation of the plan.

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[12] Approximately 10,500 more elementary school children were to be bused, and 2,838 more secondary children were to be transported. *Id.* at 4-5.

Both parties appealed the 1971 decision of this Court.[13] The defendants appealed on the bases of the Court's asserted failure to comply with Rule 23 of the Federal Rules of Civil Procedure, the invalidity of the Court's requirement of a fixed racial ratio, and the alleged adverse effects on the health and safety of the children resulting from implementation of the plan. Plaintiffs cross-appealed, claiming that their proposed plan should have been approved by the Court because it would have achieved a greater degree of integration and because the HEW plan, as accepted, placed a disproportionate burden upon black children. The Court of Appeals for the Sixth Circuit affirmed on all grounds, focusing on the discretion lodged with the district court and on the fact that some of the claims raised on appeal had not been adequately raised first in the district court.[14]

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[13] The memorandum opinion was issued on June 28, 1971, whereas the order was issued on July 15, 1971. On July 21, 1971, this Court denied defendants' motion to set aside the memorandum opinion of June 28 on the basis of the Court's alleged failure to comply with Rule 23 of the Federal Rules of Civil Procedure. *See* Appendix B to *Kelley* v. *Metropolitan County Bd. of Educ.*, 463 F.2d 732, 748-50 (6th Cir. 1972).

[14] The Court of Appeals found that this Court had used a flexible racial ratio as a guide and that such a guide had been approved by the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). Although the HEW plan was "somewhat less stringent" than the plan proposed by the plaintiffs, the Court of Appeals held that the Court's approval was within judicial discretion and had, following the mandate of *Green* v. *County School Bd. of Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), the promise of effectively dismantling the previously dual system. *Kelley* v. *Metropolitan County Bd. of Educ.*, 463 F.2d 732, 743, 746 (6th Cir. 1972). In regard to defendants' contentions that the proposed plan would work undue hardships on the children of this county, the Court of Appeals noted that such concerns had not properly been presented to the district court and were, therefore, not cognizable on appeal. Similarly, the Court of Appeals stressed the fact that the district court would be open to motions for modification by plaintiffs if there were adverse effects on black children who were, according to plaintiffs, made to bear the brunt of the busing burden. The HEW plan, as accepted, paralleled the *Swann* plan, and the incorporation of any disparate burden on black children into that plan was not addressed by the *Swann* Court.

III. SUMMARY OF ACTIONS TAKEN BY THE COURT AND THE PARTIES SINCE THE 1971 COURT ORDER

Although little action having a signficant impact on the school system was taken by this Court between the 1971 order and 1979, the parties filed myriad motions, reports, and letters, many of which were not acted upon during the eight-year period. A recounting of pleadings and other communications filed with the Court during these years will help to put the progress of and problems with school desegregation in this county into better perspective.

The first report by defendants was filed with this Court on October 19, 1971, and described the first month of operation under the plan. Two days later, plaintiffs moved to join as parties defendant the Metropolitan Government, the Metropolitan Mayor, and the members of the Metropolitan Council since they controlled the purse strings from which money for increased transportation must come.

Defendants' second report to the Court was filed on March 17, 1971, which proposed the attendance zone and other plans for a new comprehensive high school in the Joelton-Whites Creek area, which would be close to the proposed inner loop in the northeastern part of the county and which the Court in the 1971 order had indicated it would approve when plans were finalized. Additionally, the report proposed capital improvements for schools whose student composition was at least 15 percent black. No action was ever taken on the proposals included in this report.

Three months later, the defendant Board of Education filed a petition, seeking changes in the plan in regard to elementary and junior high school zones and the approval of the use of an annex for an overcrowded school in the southeastern portion of the county unaffected by the Court's busing order. Plaintiffs

responded by generally objecting to the proposed changes and requesting changes in the plan as adopted, in that it called for the closure of certain inner city black schools and clustering patterns that required more cross-busing of black children than whites.

A hearing was held pursuant to the motions filed and, by order and memorandum, issued August 17, 1972, and August 19, 1972, respectively, the Court granted plaintiffs' motion to add the additional parties defendant, approved the requested changes in the elementary school zones, but denied the defendants' proposed changes in three junior high schools that would have resulted in lessened degrees of desegregation in those schools. The Court also ordered that the Board purchase additional buses, report to the Court regarding costs of transportation, and close all schools not later than 4 p.m. each day. Further, the Court issued a temporary restraining order against the newly added defendants (council members and mayor) from interfering with the Court's order to desegregate. No action was taken by this Court on plaintiffs' concerns about the alleged disparate transportation burden on black children.

With the third district judge sitting on this case since its inception,[11] the Court held a hearing on the Board's report submitted pursuant to the Court's last order and, by order of August 31, 1972, approved that report and dissolved the injunction against the newly added defendants. Shortly thereafter, the defendant Board sought modification of the August 17, 1972, order prohibiting school closure not later than 4 p.m., which this Court granted on September 11, 1972.

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[11] When this case was first instituted and after the three-judge court was dissolved, *see* text accompanying note 1 *supra*, it was assigned to Judge William E. Miller. He continued to hear the case throughout the next fourteen years and, when he was elevated to judge of the Court of Appeals for the Sixth Circuit, he issued the memorandum

The final action taken by this Court prior to pretrial matters and the subsequent hearings in the summer of 1979 involved an action brought by three newly added black City Council defendants as third party plaintiffs against the United States, HEW, and federal officials, as third party defendants. The third party plaintiffs sought to enjoin the third party defendants from continuing to withhold federal funds that would be used for transportation expenses which would be incurred in implementing the Court's desegregation order. After holding that the Court had jurisdiction over the third-party defendants except for the United States, *see Kelley* v. *Metropolitan County Bd. of Educ.*, 372 F.Supp. 528 (M.D.Tenn.1973),[16] the Court held that the acts of the third party defendants in refusing to release funds for busing for desegregation purposes pursuant to a recently promulgated policy was illegal. The Court further enjoined the third party defendants from enforcing such an illegal and unconstitutional transportation policy and to act within their discretion upon requests for funds. *See Kelley* v. *Metropolitan County Bd. of Educ.*, 372 F.Supp. 540 (M.D.Tenn.1973).

Several matters were pending before this Court at the time it addressed the third party issues. They were not dealt with by the Court at that time nor has this Court taken any action on them since that time. As discussed *supra*, no action was ever taken in

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and order of 1970 as district judge sitting by designation. After that order, however, the case was reassigned to Judge L. Clure Morton, who retained the case until he recused himself after the defendant Mayor moved for recusal on August 22, 1972. The case was then assigned to Judge Frank Gray, Jr. When I took the bench in August of 1978, the case was then reassigned to me, making the fourth district judge sitting on this case.

[16] On December 13, 1973, the Court also granted the original defendant Board of Education leave to intervene as a third party plaintiff in this third party action.

regard to the report filed by the defendant Board on March 17, 1972, in which the Board sought approval for construction of Whites Creek Comprehensive High School. Since that time, the Whites Creek School has been constructed. The current zones for the school are incorporated into a petition filed by the Board on July 24, 1978, discussed *infra*.

Also pending at the time of this Court's last order was the Petition for Approval of the Long Range Building Program, filed on May 30, 1973.[17] This proposal outlining twenty-six building projects has essentially merged into more recent pleadings that describe future plans in greater detail.[18]

The day after the Petition for Approval of the Long Range Plan was filed, defendant Board filed a petition for approval of portables for use in kindergartens. *See* Exhibit 55. At the time of the 1971 court order, this county had not extensively instituted the systemwide, nonmandatory kindergarten program presently in existence. As discussed above, the 1971 order had specifically prohibited the use of portables for any purpose other than to achieve integration. The Court left the Board's request for portables unanswered, and the Board utilized portables at kindergarten locations beginning in the school year 1973-74.

Over two years elapsed before either party officially filed further pleadings in this case, although counsel for the Board cor-

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[17] Over a year later, on December 27, 1976, plaintiffs responded to this petition by generally denying all allegations.

[18] On the same date that the Petition for Approval of the Long Range Building Program was filed, the Board also filed a motion to produce documents. This motion has little current significance. Discovery matters raised by the parties in this case were disposed of prior to and, in some instances, during the pendency of the recent hearings.

responded by letter to the Court during this period of time.[19] The next official pleading was defendants' motion to amend their previously filed Petition for Approval of the Long Range Building Plan and for further relief, filed October 14, 1976, wherein the defendants specifically described new plans for the proposed Goodlettsville-Madison High School and asked the Court's approval to implement these plans.

The first pleadings filed by plaintiffs since 1972 were the answer to defendants' proposed long range plan and a Petition for Contempt and for Further Relief, both filed on December 27, 1976. Plaintiffs therein moved that defendants be held in contempt for their plan to construct the Goodlettsville-Madison High School,[20] the expansion of Hillsboro, Overton, Hillwood,

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[19] Counsel for the Board filed two letters unreported on the Court's docket sheet. The first was filed on August 15, 1973, and relayed the Board's decision to proceed with the plan for using portables at kindergarten sites. *See* Exhibit 55. On October 19, 1973, counsel filed a letter requesting a speedy resolution of the Petition for Approval of the Long Range Building Plan incorporated into the petition filed on May 30, 1973. *See* defendants' memorandum for status conference, filed March 29, 1979. In addition to a relatively insignificant letter filed on November 28, 1973, counsel also filed letters on July 15, 1974, *see* Exhibits 27, 39, and March 14, 1975, *see* Exhibit 37. The 1974 letter informed the Court of the Board's plan to seek funding for high schools that would, beginning in 1978-79, offer comprehensive programs. Included in this plan were the Whites Creek High School and the proposed Goodlettsville-Madison High School. Also listed in the letter were elementary schools that were part of the longrange building plan. In the 1975 letter, counsel related the projected enrollment percentages for Hillwood, Hillsboro, and Stratford, as expanded comprehensive high schools, and informed the Court that funding for vocational facilities at these schools would be sought.

[20] Defendants had described this plan in their motion to amend, filed October 14, 1976, discussed *supra*. The 1971 Court order had specifically enjoined the construction of the Goodlettsville-Madison High School, as proposed at that time since, because of its location in the white suburbs and away from the imaginary inner loop divider, it would tend to promote segregation. Since the 1971 order, however, the defendant Board had changed the proposed site location for the school from the city limits of the surburban City of Goodlettsville to a location nearer to the inner loop extended.

Glencliff, Stratford, and Maplewood High Schools into comprehensive high schools,[21] the construction of Whites Creek Comprehensive High School,[22] the establishment of the Cole Elementary School annex,[23] and, finally, the proposed closure of Pearl High School, the only traditionally black high school located in the inner city.[24]

Plaintiffs also sought alterations in the Court's 1971 order, stressing, as they had before and after the 1971 order, the disparate busing burden placed on black children.[25] According to the plan and the Board's implementation of it in the last nine years, black children are bused out of the inner city to schools in

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[21] Requests for expansion of Hillsboro High School, implicitly disapproved by the Court in the 1974 order when it denied defendants' application to acquire additional property for expansion to a comprehensive high school, had been reiterated in defendants' Petition for Approval of the Long Range Plan of May 30, 1973, and in counsel's letters of July 15, 1974, and March 14, 1975. Also included in these communications were explanations of expansion of other comprehensive high schools, listed above.

[22] Such construction had been proposed in defendants' petitions to the Court, filed March 17, 1972, and May 30, 1973, and again in counsel's letter to the Court of July 15, 1974.

[23] As reported to the Court on July 15, 1976, the Board reopened Turner School to serve as an annex for the fifth and sixth grades at Cole for the year 1976-77. Cole is located in the southeastern part of the county, outside the "court-ordered" area. whereas Turner is located further in toward the center of the city in the "court-ordered" area.

[24] By the time this case was heard in July of 1979, the Board had rejected the plan, as submitted by the staff, to close Pearl.

[25] In addition to raising this issue on appeal, plaintiffs addressed this concern in their response of August 14, 1972, to the Board's petition of July 7, 1972. The Court did not deal with this issue in its order and memorandum opinion, issued August 17, 1972, and August 19, 1972, respectively.

predominantly white neighborhoods for grades one through four, whereas white children are bused into the inner city to attend formerly predominantly black schools in grades four and five.

Plaintiffs further requested that the 1971 order be modified to include a requirement that defendants recruit, employ, and assign black personnel commensurate with the ratio of the black students in the school system. Finally, plaintiffs asked the Court to change the 1971 order to incorporate a plan to upgrade Pearl High School and other inner city schools.

In plaintiffs' petition for contempt and further relief, they additionally asked the Court to award attorneys' fees. They had previously requested attorneys' fees in motions dated February 8, 1974, and April 11, 1975, as well as in a motion, filed October 16, 1975, to dispose of the pending motions for attorneys' fees.

The next formal pleading was filed in this Court by defendant Board nearly two years later. In its Petition for Approval of School Attendance Zones for 1978-79, filed on July 24, 1978, and amended on August 18, 1978, the Board asked that the Court accept new zoning plans, grade structures, and feeder patterns.[26] Plaintiffs responded to defendants' request, but no action was taken by this Court.

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[26] The petition detailed the zone lines for Hillwood, Hillsboro, Overton, Maplewood, Glencliff, Stratford, and Whites Creek as comprehensive high schools serving grades nine through twelve, the addition of grade nine to McGavock, the county's first comprehensive high school constructed under the mandate of the 1973 Vocational Education Act, T.C.A. §§ 49-2709 *et seq.*, and the addition of grade nine to Cohn High School, the only naturally integrated inner city school, and to Pearl High School, the only remaining traditionally black inner city high school. Additionally, changes were reported for junior high and elementary schools, primarily affecting feeder patterns, decreasing overcrowding, and eliminating one grade schools.

The final pleading filed in this case prior to the 1979 pretrial matters was plaintiffs' amendment to the October 14, 1976, Petition for Contempt and for Further Relief, filed on August 28, 1978. Basically, the amended petition reiterates the concerns stated in plaintiffs' earlier petition although in addition it responded to defendants' July 24, 1978, petition.

IV. THE 1979 COURT ORDER

In the spring of 1979, this Court held a pretrial conference to distill the remaining issues, some of which had obviously laid dormant for years, and to organize the progression of the case. In an effort to simplify the future presentation of the case, the Court divided the pending matters into four phases, which would be heard seriatim: (1) Historical recapitulation of school desegregation in this county since 1971, and consideration of the Board's Long Range Plan, including requests for construction projects; (2) Matters relating to the racial composition of staff and faculty; (3) Plaintiffs' petitions for contempt; and (4) Plaintiffs' petitions for attorneys' fees.

Hearings on Phase I were held in June and July of 1979, at the conclusion of which the Court ordered that the defendant Board devise and submit to the Court a new plan for desegregation that would involve the entire metropolitan county rather than exempt the outer reaches as the 1971 order had done. *Kelley* v. *Metropolitan County Bd. of Educ.*, 479 F.Supp. 120 (M.D.Tenn.1979).[27] Because of the short time involved before the beginning of the school year 1979-80, however, the Court approved the zones already in effect for 1979-80, and allowed the Board an additional year before implementation of a countywide plan.

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[27] The Court encouraged creativity and innovation in the development of a new plan by stressing that the Board should "assum[e] no parameters heretofore ordered by the Court." *Id.* at 122. The Court instructed the Board, in developing the plan, to consider the max-

Because the Vocational Education Act, T.C.A. §§ 49-2709 *et seq.*, mandated that each school system provide children with an opportunity to attend a comprehensive high school, those children zoned to a noncomprehensive high school in this county had been allowed to transfer automatically to a comprehensive high school. At the 1979 hearings, it became apparent that white children zoned to Pearl High School in the inner city had used this opportunity to defeat the desegregation efforts at that school, leaving Pearl 96.6 percent black in the school year 1978-79. The Court, therefore, enjoined the Board from further implementation of the automatic transfer policy, ordered it to review all transfer requests, and grant such transfers only for bona fide program reasons. Such an injunction was issued orally from the bench on July 2, 1979, before the conclusion of the hearings.

On August 7, 1979, subsequent to the issuance of that injunction and the already concluded hearings, plaintiffs filed a petition for contempt, charging that the Board had not complied with the July 2 order. Hearings were held during August of 1979 on plaintiffs' motion for contempt. The Court found that the procedure used by the Board in approving subject-matter transfers had "a negative impact upon the desegregation efforts of the School Board" and violated the spirit of the Court's 1971 order as well as the July 2, 1979, order. 479 F.Supp. at 129. The

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imum utilization of existing buildings, especially those in the inner city, the economic factors of transportation costs and fuel economy, the time and distance involved in transportation, and any other factors that would "impact upon the ultimate objective of a quality educational opportunity for all children in Davidson County through a unitary school system." *Id.* In so instructing, the Court attempted to stress that the goal of the school system and the Court, in its intervention into the operation of that system, should be to insure the opportunity for quality education and that any desegregation remedy should be viewed as a means toward that end rather than an end in itself.

Court, therefore, specifically defined the procedure by which requests for subject-matter transfers should be considered. *Id.* at 124-30. Pursuant to defendants' motion filed after the hearings, the Court permitted the Board to grant any transfer requests of any senior who asked to transfer from a school to which he was zoned to the high school he attended as a junior in the previous year. *Id.* at 131-32.

V. DEVELOPMENTS SINCE THE AUGUST 1979 COURT ORDER[28]

In response to the August 27, 1979, Court order, the defendant Board began meeting on October 29, 1979, to develop a countywide desegregation plan. In compliance with the Court's suggestion that the Board encourage and consider community input,[29] the Board established a citizens' advisory panel whose members sat with the Board in its deliberations on the plan. Each of the nine Board members, three of whom were black, chose one citizen representative.[30] Five public hearings were held in November of 1979, at which time suggestions from

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[28] Due to the length and complexity of this memorandum opinion, the findings of fact and conclusions of law have not been stated separately, but this entire memorandum opinion shall constitute findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

[29] The Court noted that the significance of an difficulties in achieving a unitary school system mandate that "the best minds available to the parties, including input from the many well-motivated, thoughtful citizens of the community, should be sought and received." *Kelley* v. *Metropolitan County Bd. of Educ.*, 479 F.Supp. 120, 123 (M.D.Tenn. 1979).

[30] In addition, a white interim Board member previously apointed to fill a vacancy continued to sit with the Board as a citizen representative, although his permanent replacement had already been designated and actively participated in the deliberations.

citizens were sought in an effort to develop criteria upon which to base a plan. After the public hearings, the Board and Citizens' Advisory Panel met five times in December of 1979, to develop criteria for the plan.[31]

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[31] The Board adopted the following twelve criteria that should be utilized in the development of the plan:

1. That all schools in the county would be involved in the unitary school plan;

2. That a four-tiered system of grades be adopted, which would consist of 1-4, 5-6, 7-8, and 9-12 as nearly as possible;

3. That a child would not go to more than four schools during his experience, if his residence did not change;

4. That feeder patterns of elementary to middle to high school be established which would allow as many students as possible to remain together for as long as possible;

5. That the goal of this plan be that each school have an optimum of 32 percent black students with a 20 percent range on either side of optimum (12 percent black to 52 percent black);

6. That the goal of the plan be the establishment of a magnet program in any secondary school in which the white minority enrollment is between 10 percent and 20 percent;

7. That, wherever possible, school zones that are integrated by at least 32 percent minority (black or white) without busing for racial balance should be established;

8. That the goal of the plan be to distribute the burden of busing as equitably as possible;

9. That the planners be directed to consider all existing buildings, full utilization of presently used buildings based on projected enrollment, the option of reopening buildings not now in use, expansion of these buildings, and the possible addition of new buildings which will facilitate the conservation of time, distance and fuel and which will facilitate the other major criteria of the plan;

10. That priority consideration be given to the utilization of existing facilities prior to recommendations for construction of new buildings;

11. That the average bus ride, one way, be kept to 30 minutes and no route will be longer than 80 minutes (the longest route at the present time under the present plan);

During these December meetings, the Board voted to retain three outside consultants who had expertise in the area of school desegregation.[32] A planning team was formed, composed of the three consultants, the Assistant Superintendent for Facilities and Services, the Director of Zoning for the school system, eight principals currently employed by the school system, and two administrative employees of the Board's central office.[33] Input was also received from other experts in the field who had either worked with school systems under desegregation orders or who had academic expertise in this area.[34]

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12. That no first and second grade students be required to ride buses more than 30 minutes one way unless it is to the nearest school. *See* Collective Exhibit 154, at 479-80, 483-84, 529, 568.

[32] The three outside consultants hired by the Board were Dr. Donald Waldrip, former Superintendent of the Cincinnati Public School System, former Assistant Superintendent of the Dallas School System, private consultant to various school districts on their desegregation plans, and an authority on magnet schools; Dr. Everett Myer, Assistant Director, Educational Opportunities Planning Center, University of Tennessee, Knoxville, Tennessee; and Mr. Nathaniel Crippens, retired Associate Director of the Desegregation Assistance Center, University of Tennessee College of Education, Knoxville, Tennessee.

[33] The principals represented elementary, junior high, and high schools, including schools formerly unaffected by the Court order as well as those within the 1971 order. Of the eight principals selected, three were black. Of the two administrative personnel, one was black and one white.

[34] The five experts consulted by the Board and planning team were Dr. Jay Robinson, Superintendent of the Charlotte-Mecklenburg, North Carolina School System; Dr. Robert Crane, Sociologist and Professor at Johns Hopkins University; Dr. James Barnes of the Northeastern Desegregation Center, Hartford, Connecticut; Dr. Vern Cunningham, court-appointed Master of the Columbus, Ohio School System; and Dr. Richard Pride, Associate Professor of Political Science, Vanderbilt University, Nashville, Tennessee, and author of a study on the phenomenon of "white flight" in Louisville, Memphis, and Nashville.

The planning team worked through February 4, 1980, consulting regularly with the Board. The Board met to develop a plan, using the previously established criteria, thirteen times during January and February of 1980, spending over 65 hours on its formulation. Two of these meetings were devoted to public hearings to obtain further community imput. *See* Exhibit 177. In the early morning hours of February 5, 1980, the Board adopted a plan, after spending close to one hundred hours of preparation and deliberation. *See* Exhibit 178.

The plan, thus developed and approved, was submitted to the Court on February 11, 1980. In its regular February 12, 1980, meeting, however, the Board voted to amend the plan. Such amendment was filed with the Court on February 14, 1980, by way of affidavit of counsel for defendant Board. Plaintiffs filed their objections to the Board's proposed plan on February 29, 1980. A diverse group of plaintiff-intervenors,[35] representing schools slated for closure under the Board plan, requested and were granted permission to intervene and filed the rudiments of an alternative plan on February 29, 1980. The intervenors' plan was modified and refined during the course of the hearings and submitted with greater detail in their proposed plan on April 14, 1980.

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[35] The intervenors represented parents and concerned citizens from the following areas:

(1) the Bellevue community, which is a growing, predominantly white area in the southwest portion of the county in which the Board proposes to close Bellevue High School, leaving only a junior high;

(2) the Joelton community, which is a rural, predominantly white area in the northwestern part of the county where the Board proposes to close Joelton High School, leaving it operational as an elementary and junior high;

(3) the inner city, integrated neighborhood surrounding Cohn High School; and

Hearings in this case recommenced on March 3, 1980, and were held for sixteen days in March, nine days in April, and ended with closing arguments on May 1, 1980. During these hearings, testimony was received regarding the plans submitted by both the defendant Board and the intervenors. Before the hearings started, while they were in progress, and even thereafter, the Court received several hundred letters from parents, interested citizens, and community groups, all of which were made a part of the official record in this case. A comparable number of letters was received by the defendant Board. The compendium of such letters to the Board was introduced into the record as Collective Exhibit 170. Amicus curiae briefs were filed by the Metropolitan Nashville Education Association, the League of Women Voters, and the American Education Legal Defense Fund. The three black members of the Board filed a dissent to the plan proposed by the Board and also testified at the hearings. Another white Board member also filed a separate, written dissent from the plan.

During the course of the hearings, the plaintiffs were offered the opportunity to file an alternative plan. This offer was first declined but later accepted by the plaintiffs. The additional time requested in which to develop such a plan, however, appeared to preclude a resolution of the case by the beginning of the school year 1980-81 and, therefore, no such plan was presented. The plaintiffs did, through their expert witness, Dr. Hugh

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(4) the almost totally black neighborhood adjacent to the inner city Pearl High School.

The Court cannot help but be pleasantly surprised as well as exceedingly gratified that citizens from these communities with diverse concerns and needs have bound together in a spirit of cooperation and industry. It is to be hoped that these citizens will continue to work together in the coming years to insure the effectiveness of a unitary school system in this county.

Scott,[36] offer specific objections, recommendations, and suggestions to the Court.

During the pendency of the hearings and thereafter, the Court read all communications from the public and studied in detail the plans proposed by the defendant Board and the intervenors, the objections filed by the plaintiffs, and the concerns and suggestions presented in the amicus briefs. The plans and objections thereto will be described below.

VI. PROPOSED DESEGREGATION PLAN SUBMITTED BY DEFENDANT SCHOOL BOARD

Several basic principles, developed initially by the Board as criteria to be used in formulating the plan, *see* note 31 *supra,* are woven into the plan as finally adopted and submitted to the Court although rigid adherence to these goals was apparently not always possible. The Board determined that a four-tiered grade structure was the most conducive to integration efforts and that such grade structures would, when feasible, consist of grades 1-4, 5-6, 7-8, and 9-12. The Board adjusted the previous range of percentage of black students per school from 15-35 percent, as adopted by the Court in 1971, to an optimum of 32 percent black with a range of 20 percent in either direction, thus allowing a given school to have only 12 percent black or as much as 52 percent black. The Board focused on the concern of lengthy bus rides by setting a limit of 80 minutes for the longest one-way bus ride[37] and 30 minutes for first and second graders unless a longer ride is necessary to reach the nearest school.

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[36] Dr. Scott is presently Dean for Programs in Education and Professor of Education at Hunter College of the City University of New York. He has been a professor of education at Howard University, Superintendent of Schools for the Public Schools of the District of Columbia, Region Assistant Superintendent fro the Detroit Public Schools, and has published numerous articles relating to education.

[37] Some white children are presently bused 80 minutes for nonintegration purposes to attend the nearest school.

A. Senior High School Plan

The Board plan provides for the retention of the eight existing comprehensive high schools to serve grades 9-12, and the immediate closure of only two of the nine traditional high schools. Joelton High School, in the northwest portion of the county previously unaffected by the Court order, and Bellevue High School, in the southwestern corner of the county, also outside of the Court order, are slated to be closed as high schools but retained as junior highs. The Board proposes to maintain Hume Fogg High School, located in downtown Nashville, as an open-zoned, vocational-educational school for grades 10-12. West End Junior High School would be converted into an open-zoned, magnet school for the academically gifted and would serve grades 7-8 the first year, with one grade per year being added thereafter. In addition to Hume Fogg, only two schools will be limited to grades 10-12. The Board recommends a gradual phasing out of Pearl High School, discussed *infra*. Because of the building capacity of DuPont High School, it is not possible to accommodate ninth graders there using the present zone. With these exceptions, all other comprehensive and traditional high schools would serve grades 9-12.

The Board proposed two alternative plans regarding the two existing inner city high schools. The primary plan calls for the construction of a new inner city, comprehensive high school in a contiguous zone around the present Cohn and Pearl High Schools but somewhat smaller than the existing zones for the two schools.[38] In the meantime, the Board suggests that those students who have been attending Pearl, Cohn, and Hillwood, a comprehensive high school located in a white neighborhood

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[38] Although the Board has not chosen a specific site for Pearl-Cohn, the staff has studied the possibility of using the site of the present Cockrill Elementary School, located close to the current Cohn building.

southwest of the inner city to which students from the inner city have been bused, remain at those schools. Those children who, under the old plan, would have entered either Pearl or Cohn beginning in the ninth grade would be zoned to Cohn, resulting in a gradual phasing out of Pearl. Since no students outside of the inner city would be zoned to Pearl during the three year phasing out period, it would be overwhelmingly black. In fact, the Board projects that Pearl's student population would be 92 percent black in the year 1980-81. Cohn, on the other hand, would be within the 12-52 percent range approved by the Board. In contrast, Antioch, located in the southeastern part of the county in a predominantly white neighborhood and slated to receive some students formerly zoned to Pearl, would have students formerly zoned to Pearl, would have a projected black attendance of only 5 percent. Once Pearl is phased out, however, black students in the noncontiguous, former Pearl zone would be zoned to Antioch, raising the percentage to 18 beginning in the 1983-84 school year.

The Board outlined an alternative plan encompassing the inner city high schools in the event the Court did not accept the above-described plan. This alternative plan entailed the closure of both Pearl and Cohn as regular high schools and the rezoning of students now zoned to Pearl and Cohn (except for those students in the present Pearl zone who would attend Antioch) to Hillwood and Hillsboro, both comprehensive high schools located in predominantly white neighborhoods.

The second and final proposal for high school construction involves a new Goodlettsville-Madison-Trinity Hills Comprehensive High School, the plan for which the Board has essentially been seeking approval from the Court since 1972. The present Goodlettsville and Madison High Schools would be closed but retained as junior high schools. Students from northwest

Nashville living southwest of Maplewood High School would be bused to the Goodlettsville-Madison High School, giving it a racial ratio within the approved range. Additionally, Stratford Comprehensive High School, whose zone would be contiguous to the zone for the proposed new school, would be within the approved range without pairing with a non-contiguous neighborhood. In contrast, Maplewood and Whites Creek Comprehensive High Schools, also contiguous to the proposed zone for Goodlettsville-Madison, would have a racial ratio of 54 and 58 percent black, respectively, both slightly above the approved range.

The original Board plan contemplated the closure of East High School, located in what is called East Nashville north of the Cumberland River. The Board on February 12, 1980, however, amended the plan to study the feasibility of leaving East open beyond 1983 and revising the previously adopted zone for the new Goodlettsville-Madison Comprehensive High School. It is projected that East would have a student population consisting of 55 percent black students, a ratio slightly over the approved range. With the exception of East, Maplewood, Whites Creek High Schools, and Antioch for the interim period, all other comprehensive and traditional high schools in the county would have racial ratios within the approved range.

During the period of construction of the new Goodlettsville-Madison High School, the Board suggested that inner city students be bused to both Goodlettsville and Madison, giving each of these schools a 12 percent black population. In the event that the Court disapproved of the construction of the Goodlettsville-Madison High School, the Board adopted an alternative plan that would convert Goodlettsville High School to a junior high school, serving grades 7-9 from the present

Goodlettsville and Maplewood zones and altering the Maplewood grade structure from its present 9-12 tier to a 10-12 school. Under this plan, both Maplewood and Goodlettsville would have racial ratios within the approved range. The same noncontiguous zone as established for the primary interim plan would be assigned to Madison, making it 12 percent black.

B. Junior High School Plan

With the exception of DuPont Junior High School, the Board proposed that all junior high schools house grades seven and eight. Because DuPont Senior High cannot accommodate grades 9-12, the Board suggested that DuPont Junior High serve grades 7-9, including the middle portion of the area otherwise zoned to Donelson that consists of children who would be bused to DuPont for ninth grade.

As previously discussed, Bellevue and Joelton Senior High Schools would be retained only as junior highs. The Board plan included five noncontiguous zones from which children living in the inner city and in northeast Nashville would be bused to integrate Bellevue, Donelson, Apollo, Goodlettsville, and Neely's Bend Junior High Schools, all of which are suburban, predominantly white schools. In addition, the predominantly white suburban children in the Antioch zone in the southeastern portion of the county would be zoned to Cameron Junior High School, located in the inner city. By expanding and annexing the nearby Johnson Elementary School, previously closed by the Board, Cameron would become one of two middle schools serving grades 5-8. The fifth and sixth graders would be bused into the Cameron Complex from the same zone as the seventh and eighth graders. The second middle school serving grades 5-8 would be the Donelson Complex, located in the eastern part of the county. It would be comprised of the present Donelson Junior High School and the nearby Donelson Elementary School and would receive the same children from the northeastern part of the inner city in all four grades.

C. Elementary Schools

As discussed above, the Board developed a two-tiered elementary structure of schools housing grades 1-4 and 5-6. There are, however, many variations in this formula in the final plan due primarily to transportation distances and degrees of natural neighborhood integration surrounding existing elementary schools. Three schools in East Nashville north of the Cumberland River are scheduled to serve grades 1-6 from the integrated neighborhoods surrounding them.[9]

In addition, a fourth school would be retained as a 1-6 school. The Board's criterion that no student should be bused for more than 80 minutes except to the nearest school precluded the Board from attempting to integrate Harpeth Valley Elementary School, located in the suburban, predominantly white southwestern portion of the county. The Board had initially assigned these 42 children to an inner city school but later altered that assignment due to the travel distance involved. Harpeth Valley would thus remain overwhelmingly white.

Similarly, the Board's criterion precluding busing for first and second graders for more than 30 minutes except to the nearest school affected inner city children who normally would have been bused to one of three 1-4 centers in the eastern part of the county. The Board, therefore, proposed to give these children a choice between attending Buena Vista, located on the edge of a zone contiguous to theirs, or one of the three schools to the east. They would then attend Jackson, Hermitage, or Dodson Elementary School in the Donelson cluster for grades three and four and the Donelson Complex for middle school in grades five through eight.

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[9] These three schools are Cotton, Howe, and Ross, contiguous to each other and located in the East and Stratford High School zones. It is extremely disheartening that only three schools in the county can boast of integrated neighborhoods from which the children can attend true neighborhood schools in an integrated setting without the necessity of noncontiguous busing or clustering of schools.

The thirty minute limit on busing for young children also motivated the Board to reconsider the pairing of those children in East Nashville, just north of the Cumberland River, with the three elementary schools in the Neely's Bend area to the northeast. These inner city children near Caldwell Elementary School would have to travel more than thirty minutes to attend the Neely's Bend area schools and vice versa. The Board, therefore, devised a meeting place for these children at Baxter School, located to the northeast of the inner city. Travel distances for the inner city and the more suburban children would be comparable. After attending Baxter, the inner city children would then be bused to one of three 3-6 centers in the Neely's Bend area. The Neely's Bend children would be bused to Baxter for grades one and two but would return to their neighborhood schools for grades 3-6.

The Board developed eleven clusters in which the children would not have to be bused to schools in noncontiguous zones. By drawing zoning lines to take into account the racial makeup of populations within the clusters and pairing schools within the clusters, the Board provided these children the opportunity to stay within their cluster for their entire elementary educational experience. Two clusters out of the eleven, however, are unique. The fifth and sixth graders from the northernmost portion of the Crieve Hall cluster, a somewhat triangular zone in the south central part of the county, are zoned to Binkley School, a 5-6 center in the contiguous cluster to the southeast, rather than to Crieve Hall, located in their cluster slightly to the southwest of Binkley.

Several clusters form irregular triangles emanating from the center of the county with broadening bases at the county lines. For the most part, the schools toward the inner city are 5-6 centers and the more suburban schools are designated as 1-4 centers. This pattern is reflected in five of the seven clusters forming irregular triangles. In three of the elementary clusters the

schools are located or zone lines drawn so that the pattern described above is inapplicable.

Because of the lack of neighborhood integration, the Board determined that six clusters had to be paired with six other noncontiguous clusters and thus busing across other zones would be necessary. Inner city children surrounding Cameron Junior High in an irregular triangular zone cut out from the Napier cluster would be paired with an irregular circular zone in the far southeastern part of the county. These inner city children would be bused out to the suburban schools for grades 1-4, whereas the suburban children would be bused in to Cameron for grades 5-8. Similarly, inner city children in the north Nashville Wharton zone would be bused to suburban schools in the southwestern part of the county for grades 1-4, and the suburban children would be bused to Wharton for fifth and sixth grades.

The same pattern applied in the zone for children in northeast Nashville around Haynes School who would be zoned to one of three 1-4 centers in the northeastern part of the county, and the fifth and sixth grade children in the Amqui zone who would, in turn, be bused into the city to Haynes. Again, the pattern repeated itself for those children in the zone north of but contiguous to the Haynes zone. They would be bused north to Union Hill or Goodlettsville for grades 1-4, and the suburban children bused in to Brick Church for fifth and sixth grades. Predictably, the children in grades 1-4 in the inner city zone around Buena Vista would be zoned to either McGavock or Hickman to the east and the more suburban children bused in to Buena Vista for grades five and six. The two pairings of the noncontiguous zones in the suburban Neely's Bend area with inner city Caldwell, and the inner city North Nashville zone with the Donelson zone have already been discussed.

Only one pairing deviated from the pattern of busing inner city children to more suburban schools in grades 1-4 and suburban

children into the city for grades five and six. In the zone north of the Cumberland River containing Shwab, Joy, and GraMar, children would remain in that cluster, attending Joy for grades one and two and either Gra-Mar or Shwab for grades 3-6, whereas the children in the zone slightly to the northeast attend Bellshire for grades 3-6 but are bused in toward the city to attend Joy for grades one and two.

Although the Board has adopted a plan to convert West End Junior High to a junior and senior high magnet, with the alternative plan for Pearl to be converted into a magnet, the Board has not chosen which, if any, elementary schools would become magnets. The planners, however, have recommended that five elementary schools be made magnets, feeding into the secondary magnet. This recommendation includes Stateland, located in the Donelson cluster in the eastern part of the county and formerly used as an annex for Dodson School; Dan Mills, located in the Inglewood cluster to the northeast of the inner city; Burton, located in the Stokes cluster in the southern suburban area of the county; Parmer, also in the Stokes cluster toward the southwestern part of the county; and Ford Greene, in the inner city in the Head cluster.

Under the Board's plan, nine elementary schools would be closed for all purposes. Three of these schools are in the inner city whereas the other five are located in more suburban areas to the southwest and southeast of the inner city.

The Board projected that in 1980, under its proposed plan, 87 percent of all elementary school students would attend schools within the approved racial ratio range of 12 to 52 percent black. With the exception of DuPont and Harpeth Valley Elementary, all of the twelve elementary schools whose racial ratios fall outside the approved range are located north of the Cumberland River. In these ten schools, the percentage of blacks is projected to exceed 52 percent. This deviation can be explained by the fact

that the black population is most concentrated north of the river where blacks make up 40 percent of the population whereas throughout the county blacks comprise only 32 percent. The largest percentage of blacks attending elementary schools would, however, only be 63 percent, which is projected for three elementary schools.

VII. PLAINTIFFS' OBJECTIONS TO THE BOARD PLAN

As noted above, plaintiffs did not propose a plan as such. However, very specific objections were made and specific recommendations were offered through plaintiffs' pleadings and witnesses.

A. Disparate Burden

Plaintiffs' major complaint to the 1971 plan and to that of the Board now under consideration is the disparate burden each places upon young black children. Both plans are premised upon the "busing out" of black children in grades 1-4, and the "busing in" of white children in grades 5-6. Plaintiffs insist that such a premise places all of the burden of the desegregative effort upon the young black child while permitting the young white child to attend a neighborhood school. They postulate that the early primary grades are the most formative years of a child's educational experience. Continuity is extremely important during these years. The ability of a kindergarten teacher to discuss a child's problems and progress with a first grade teacher, and the first grade teacher with the second, is important educationally to both white and black children, but even more so to the child from a socioeconomically deprived background in which parental support may not be as present. Plaintiffs point out that under the proposed plan, as well as under the 1971 order, the inner city black child never goes to the same school for first grade as he does for kindergarten.

Another claimed damaging impact on young black children in the plan is that, in most instances, the black children are taken from a familiar, friendly, supportive environment into what can often be a hostile and unfamiliar environment. This is asserted to be particularly harmful to black children from an underprivileged socioeconomic status. Once again, it is also harmful to white children, but not as severe in higher socioeconomic families.

A third problem cited by plaintiffs with the transportation of young black children away from their familiar environment in the early grades is the inability to have parental contact and input. Parents of lower socioeconomic status are much less likely to have linkage with the teacher, particularly when the assigned school is in a distant suburb inaccessible by public transportation.

B. Educational Unsoundness of the Four-Tiered Structure

Under the proposed Board plan as well as under the present 1971 order, most children will go to at least four schools during their K-12 school experience and almost all black children will go to five schools. Not only plaintiffs' experts, but also all those who testified for intervenors as well as the Board, assert that a three-tiered structure is far more educationally sound. In its admission of this principle, the Board acknowledged that its use of a four-tiered structure plus kindergarten was chosen to facilitate the achievement of desired racial ratios.

C. Closure of Inner City Schools

The Board plan proposes to close five more elementary schools in or on the edge of predominantly black areas. In addition, under the various alternatives of the plan, Pearl High School is contemplated for either closure or conversion to a

magnet school. Pearl is the only remaining historically black high school. Plaintiffs argue persuasively for the retention of Pearl because of its historic contribution to the black community of Nashville, the contribution of its graduates to the nation, its value as a source of ethnic pride and symbol of black achievement, and the fact that it is a sound structure, aesthetically attractive, and functional. The building was designed by black architects, constructed by black contractors, and has graduated black persons who have gone on to great achievements in the region and the nation. Such role models are of significant importance to young black children seeking to break out of the bonds of poverty and overcome the unfortunately still-present effects of our shameful two-hundred-year history of discrimination against the black citizens of this land. Substantial proof from many prominent black leaders was offered in support of these contentions.

D. The Rightness of Whiteness or "Osmosis" Effect

The Board plan and the 1971 plan are both premised upon a goal that the percentage of black students in each school represent the percentage of blacks in the county. This is justified upon the philosophy that each public school should be a microcosm of the community it serves and that it is necessary to use such a percentage mix in order to have enough blacks "to spread around," thereby achieving racial balance in all schools, and upon the now questioned sociological studies that attempted to demonstrate an educational osmosis effect on a black child from being in a majority white school setting. Plaintiffs insist: (1) the microcosm effect is practically impossible; (2) the "spreading around" effect is inherently disparately burdensome to blacks; and (3) the osmosis theory is invidiously racist and based upon assumed black inferiority. Plaintiffs assert that to contend that a black child can receive a quality education only

in a white majority classroom is blatantly racist and paternalistic. In addition, because the earlier sociological studies that may have indicated an osmosis effect have been subjected to such serious methodological question, and because more recent studies have indicated the incorrectness of the earlier conclusions, they should be disregarded.

This point of departure demonstrates the evolution of desegregation philosophy that has occurred among educators, sociologists, black parents, and plaintiffs in this litigation as well as in similar litigation across the country. Historically, black plaintiffs felt the necessity to be in a majority white school in order to be assured of equal distribution of educational funding. The assertion and recognition of the right to equal protection of the laws has rendered this reason irrelevant in today's climate. A dramatic role reversal has taken place. In this case, we have a white majority of the school board, acting on the advice of a white desegregation expert, recommending to the Court *more* busing to achieve *more* racial balance. Equally contrary to earlier posture, the black plaintiffs urge upon the Court *less* busing, *more* neighborhood characteristics to the assignment plan, and the permissibility of majority black schools.

Based upon these and other criticisms of the Board plan, the plaintiffs recommend specific features which any revisions should incorporate:

1. An intervention program that addresses the needs of students who are deficient in the basic skills, especially when such students are bused to schools not in their immediate neighborhood;

2. A program at all schools that provides relevant educational experiences geared to helping students acquire an understanding of the life and culture of black Americans;

3. Programs and services that address the needs of students, black and white, who are achieving below the national norms in the basic skill areas;

4. A mechanism that insures that black students do indeed gain equitable access to the specialized programs offered in the comprehensive high schools;

5. A commitment to the maintenance of Pearl High School;

6. The concept that either whites or blacks can constitute the minority racial group;

7. The maintenance of the kindergarten and the primary grades as an integral educational unit;

8. A busing formula that does not shift black students in disproportionate numbers to white students;

9. A commitment not to dislocate black students disproportionately in the kindergarten and early grades;

10. An improved systemwide ratio of black teachers and black administrators;

11. A policy that permits a greater number of black teachers to be assigned to predominantly black schools.

VIII. THE INTERVENORS' PLAN

The plan submitted by the intervenors was hurriedly prepared and therefore understandably lacks refinement in some of its details. It consists of a three-tiered structure within six geographical clusters of elementary, middle schools, and high schools. The elementary schools are neighborhood in character and admittedly do not make maximum utilization of buildings, nor have the neighborhood lines been drawn with a view to maximize integration possibilities within the neighborhood concept. The range of black-white student population ratios for elementary schools within the various clusters are:

E Cluster—from 100 percent white at Union Hill to 99 percent black at Kings Lane

Q Cluster—from 94.4 percent white at Stratton to 82.7 percent black at Glenn

U Cluster—from 99.4 white at Stanford to 88.8 percent black at Caldwell

I Cluster—from 97.2 percent white at Berry to 86.7 percent black at Napier

T Cluster—from 98.7 percent white at Crieve Hall to 98.3 percent black at Ford Greene

Y Cluster—from 98 percent white at Harpeth Valley to 99.2 percent black at McKissack

(Exhibit 227). The elementary student assignment plan did not consider kindergarten, or special education students, or building requirements. (Exhibit 179).

The middle schools within each cluster join a number of the elementary schools to feed each middle school. No noncontiguous zones are utilized to achieve greater degrees of integration. The ranges of black-white student populations are:

E Cluster—from 97.4 percent white at Goodlettsville to 70.8 percent black at Ewing Park.

Q Cluster—from 94.4 percent white at Neely's Bend to 56.7 percent white at Highland Heights.

U Cluster—from 99.1 percent white at Two Rivers to 64.2 percent black at Meigs

21 Cluster—from 94.6 percent white at Apollo to 80 percent black at Cameron

T Cluster—from 91.7 percent white at McMurray to 95.6 percent black at Wharton

Y Cluster—from 95.7 percent white at Bellevue to 42.7 percent black at West End

(Exhibit 227).

The high school plan envisions retention of the existing comprehensive high schools, but also would retain Pearl, Cohn, Bellevue, Joelton, Antioch, East, DuPont, Madison, and Goodlettsville as "traditional" high schools. An option would be offered to each student within each cluster of either a comprehensive or traditional secondary education.

The plan contains a number of voluntary components designed to foster community support and also to facilitate integration. Failure to achieve or maintain at least a 10 percent racial minority presence (black or white) within a reasonable time after use of magnet programs and zone readjustments would result in closure of the school. If a school fell below 50 percent utilization it would be closed. Application for transfer from a "traditional" to a comprehensive high school which would have a negative impact on integration would be first subjected to a course offering at the "traditional" school to attempt to prevent the transfer.

The intervenors' plan emphasizes the use of public transportation facilities as both a money-saving device and as a method for establishing natural linkages among students, parents, and the receiving schools. The point is well made that access to a school by public transportation tends to foster parent participation in school activities and in the education of their children, facilitate the participation of children in afterschool extracurricular activities, and encourage intercommunity relationships. As noted in the discussion of the Board's plan, noncontiguous zoning between communities, between which there is no public

transporation and little other commonality, has many inherent problems and disadvantages. Close coordination between the Board and the Metropolitan Transit Authority is urged in establishing new routes and future school construction.

The high school plan departs from a consistent feeder pattern for the middle schools. For example, some children who went to middle school at John T. Moore in the "T" cluster will go to high school in the "Y" cluster. Some who went to West End in the "Y" cluster will go to high school in the "T" cluster. Litton middle schoolers will be split between the "Q" and "U" clusters. (Exhibits 225 and 226).

The intervenors urge the Court to defer adoption of any plan until 1981—82 in order to implement their suggestion.

Although the voluntary components of the plan offer attractive alternatives designed to foster community support for the school system, the plan is defective in a number of respects.

First, it emanates largely from a parochial desire to maintain high schools in established communities such as Pearl, Cohn, Bellevue, and Joelton in contratiction to the Board's established policy (and state mandate) of a system of comprehensive high schools. There is a growing debate among professional educators as to the wisdom and educational value of comprehensive high schools. This Court need not enter or take sides in the debate except to the extent that the decision may facilitate or deter efforts to achieve a unitary system. Otherwise, it is an educational decision.

It is impossible to justify maintenance of Pearl, Cohn, and Bellevue in the southwest quarter of the county alongside the three comprehensive high schools (Hillwood, Overton, and Hillsboro) that have been built in the same quadrant. At the anticipated enrollment for 1983, these three new comprehensive high schools could accommodate all students in the

southwestern quadrant, leaving the Pearl, Cohn, and Bellevue buildings available for other uses, and still have *1156 empty seats.*[40] Under the same 1983 projections, the new Whites Creek Comprehensive High School can absorb all Joelton students and still have *372 empty seats.* (Exhibit 155).

Such underutilization seems economically unjustifiable and there is no basis upon which the Court could mandate it.

More importantly, the intervenors' plan substantially resegregates most of the proposed "traditional" high schools. Initially, Madison would be 97.8 percent white, DuPont would 98.8 percent white, Antioch would be 96.2 percent white, Bellevue would 97.1 percent white, and Pearl would 92.7 percent black. Some of the currently integrated comprehensive high schools would revert to identifiably black or white schools: Overton would become 96.2 percent white, Hillsboro would become 95.9 percent white, and McGavock would become 96.4 percent white. Intervenors would rely on the voluntary components and magnet aspects of their plan to bring these schools to a minimum 10 percent of either race as a minority in such schools. However, the prospect of such an eventuality is unduly optimistic at best.

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[40] The following projections were made for 1983 (assuming the construction of both the Pearl-Cohn and Goodlettsville-Madison Comprehensive High Schools):

	Capacity	Students	Empty Seats
Hillsboro	1751	959	792
Overton	1819	1336	483
Hillwood	2190	1206	984
	2259		
Pearl-Cohn	1100	1103	-3

Thus if the Pearl, Cohn, and Bellevue students were incorporated into Hillsboro, Overton, and Hillwood, there would still be 1156 empty places. (Exhibit 155).

IX. THE COURT'S RESPONSIBILITY

A. *A "Unitary" System*

[1] Once a finding has been made that a racially discriminatory dual school system has been maintained,[41] it is the responsibility of the School Board, under supervision of the Court, to achieve a "unitary" school system. *Green* v. *County School Bd.*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968). Perhaps intentionally, no precise definition of what constitutes a "unitary" system has been laid down. In *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19, 20, 90 S.Ct. 29, 24 L.Ed.2d 19, 21 (1969) (per curiam), the Supreme Court mandated a system "within which no person is to be effectively excluded from any school because of race or color." This definition was reiterated in the concurring opinion of Chief Justice Burger in *Northcross* v. *Board of Educ.*, 397 U.S. 232, 237, 90 S.Ct. 891, 893, 25 L.Ed.2d 246, 250—51 (1970) (per curiam).

Pursuant to this Court's direction to seek public input to the proposed plan, the Board invited definitions of "unitary school system" at its public hearings. Some of these bear repeating:

> By the nature of the title an Unitary School System implies oneness of opportunity for all children, oneness of administration, oneness of financial support, oneness of educational philosophy, oneness with Metropolitan Government, and oneness geographically centered at and emanating from the heart of the innercity.

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[41] The defendant, then Board of Education of the City of Nashville, conceded shortly after this case was instituted that the state laws under which defendant operated a dual system were unconstitutional. *See Kelly (sic)* v. *Board of Educ.*, 159 F.Supp. 272 (M.D.Tenn.1958); *Kelley* v. *Board of Educ.*, 139 F.Supp. 578 (M.D. Tenn.1956).

Councilman William E. Higgins

> A Unitary School System is that system which is designed and functions to the extent that equal resources and access to quality education are available to all parts and groups of a given community.

Rev. Amos Jones, North Nashville Community Council & Social Action

> A unitary school system is one offering each student equal access to the facilities, materials and staff to provide the opportunity to meet his/her educational needs. This uniformity of opportunity must also extend to parent, family and citizen involvement in the educational system.

Exhibit 2 to plaitniffs' proposed plan, filed Feb. 11, 1980.

Brown v. *Board of Educ. (Brown II)*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), broke down the barriers excluding black children from attending schools with white children. *Green* v. *County School Bd., supra*, described the ultimate goal to be a unitary, nonracial system of public education, and onerated school boards to "come forward with a plan that promises *realistically* to work, and promises *realistically* to work *now*." 391 U.S. at 439, 88 S.Ct. at 1694, 20 L.Ed.2d at 724 (emphasis added). *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), identified and utilized transportation of students to acheive racial mix, and gerrymandered zone lines and/or noncontiguous zones as permissible remedial devices to achieve a unitary system. *Milliken* v. *Bradley (Milliken I)*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), emphasized the *remedial* nature of the Court's responsibility and expanded the charge to include such action as would as nearly as possible "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 746, 94 S.Ct. at

3128, 41 L.Ed.2d at 1092. *Milliken* v. *Bradley (Milliken II)*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977), specifically approved remediation in the form of educational components designed to "restore the victims of discriminatory conduct to the position they would have *enjoyed in terms of education* . . .." *Id.* at 282, 97 S.Ct. at 2758, 53 L.Ed.2d at 757 (emphasis added).

Thus the definition of a "unitary" school system has expanded from *Brown* to *Milliken* from a mere destruction of barriers, to pupil assignment, to remediation and quality education.

B. *Racial Ratios*

As noted above, the thinking of sociologists, educators, legal scholars, black plaintiffs, and jurists has also undergone evolution. Earlier literature and studies of varying methodological purity postulated a benefit to black children from a school setting in which white middle class children were in the majority. This thinking has changed significantly.[42]

Swann may have been misinterpreted to state a requirement of racial ratios in all schools unless the Board could carry the heavy burden of proving the rationale of the exception. Thus, it has perhaps appeared that the achievement of racial ratios has become an *end* of litigation of this type, rather than the *remedy* it was conceived to be. District Judge McMillan, in the *Swann* case, indicated that such a future emphasis would be misplaced:

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[42] In his testimony during the hearings, Dr. Scott repeatedly questioned and criticized the assumption that it is necessarily more advantageous to black children to attend majority white rather than majority black schools. *See* discussion in section 4 of Part VI, *supra*. *See also* Bell, *Brown* v. *Board of Education and the Interest-Convergence Dilemma*, 93 Harv.L.Rev. 518 (1980).

> This court has not ruled, and does not rule that "racial balance" is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor that the particular order entered in this case would be correct in other circumstances not before this court.*

Swann v. *Charlotte-Mecklenburg Bd. of Educ., supra,* 402 U.S. at 25 n. 9, 91 S.Ct. at 1280 n. 9, 28 L.Ed.2d at 571—72 n. 9 (emphasis in original), *quoting with approval* from Judge McMillan's memorandum of August 3, 1970.

The Supreme Court, in *Swann,* observed the "familiar" metropolitan phenomenon (present in Nashville) of concentrations of black population in one part of the city. It further recognized that, as a result of this phonomenon, "certain schools may remain all or largely of one race until new schools can be provided or neighborhood patters change." 402 U.S. at 25, 91 S.Ct. at 1281, 28 L.Ed.2d at 572. No specific degree of racial mixing is mandated by *Swann* nor is "desegregation" defined as requiring every school to reflect the racial composition of the system as a whole.[43]

Busing and zoning are *"permissible* tool[s]," 402 U.S. at 28, 91 S.Ct. at 1282, 28 L.Ed.2d at 574 (emphasis added), in fashioning a remedy. From *Brown II* forward, the courts' responsibility has been equitable in nature. "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a

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[43] In *Pasadena City Bd. of Educ.* v. *Spangler,* 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976), the Court reiterated that there was no "substantive constitutional right [to a] particular degree of racial balance or mixing . . .." *Id.* at 434, 96 S.Ct. at 2703, 49 L.Ed.2d at 607, *quoting Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra,* 402 U.S. at 24, 91 S.Ct. at 1280, 28 L.Ed.2d at 571.

practical flexibility in shaping its remedies . . .." *Brown* v. *Board of Educ., supra,* 349 U.S. at 300, 75 S.Ct. at 756, 99 L.Ed. at 1106.

[2] As remedies, each must be subjected to the traditional balancing tests required of a court of equity; effectiveness must be weighed against other available alternatives, and each alternative must be assessed in terms of its relative costs. This was the command of *Brown II,* it was the lesson of *Green,* it was the essence of *Swann,* it reached full flower in *Milliken II.*

Such a balancing is particularly appropriate in the case before this Court. Here, we are not dealing with a "conversion from a dual to a unitary system," as the Swann Court faced. 402 U.S. at 26, 91 S.Ct. at 1281, 28 L.Ed.2d at 572. This Court has been dealing with the problem for 25 years and this system has had in place a *Swann*-type remedy for nine years. Here we are assessing the effectiveness of the remedy and such changes as are made should be done in light of this experience.

X. THE EFFICACY OF THE REMEDY

[3] A partial assessment of the remedy under the 1971 order was contained in the recitation of history in Parts II—V above. It cannot be overemphasized that an evaluation and consideration of modifications to the *Swann*-type remedy in effect in this county could not be possible had a comprehensive desegregation order requiring busing not been decreed and implemented. Were this Court addressing the situation in this county as it existed in 1971, there would be no alternative but to order the implementation of a plan that entailed school pairings, noncontiguous zoning, and substantial busing. Nothing in this opinion should reflect a diminution of the realization of the necessity of such an order in 1971.

It is only after nine years of zoning and busing to achieve a desegregated system and the changes that have taken place in the community and in the attitude manifested by the School Board that it is possible to reevaluate the efficacy of the remedy incorporated into the 1971 order. With this understanding, the Board's proposed plan will now be scrutinized as to its efficacy in terms of:

1. Its realistic promise of achievement of a unitary system;

2. Its relative burden on black and white children;

3. Its social cost in the deterioration of public support for education;

4. Its educational cost; and

5. Its economic cost.

A. *Realistic Promise of Achievement*

The Board's plan was proposed in good faith reliance upon the assumption that the August 1979 order of this Court and the legal precedent of *Swann* required a "more-of-the-same" type of remedy. The plan would achieve an initial racial mix in which blacks will, in nearly all cases, be in the minority. But will these ratios be realistically achieved or, if initially achieved, will they be capable of realistic maintenance?

The spectre that haunts all of the parties to this case, the Court, and the community is a public school system populated by the poor and black, and a private school system serving the affluent and white. The Board presented as one of its witnesses Dr. Rilchard A. Pride, Associate Professor of Political Science, Vanderbilt University. Dr. Pride was commissioned by the Board to study "Patterns of White Flight: 1971—1979," and his scholarly study and analysis appear in the record as Exhibit 247.

Dr. Pride took the statistic of a decline in white enrollment in the public schools of 22,098 between June 1971 and June 1979[44] and sought to explain the decline. He found that:

> "white flight" is a significant problem in Nashville. In brief, it was found that in 1979 each cohort (grade level) was about 15 percent below what would have been expected in the absence of court-ordered busing, (2) this average cohort loss has increased since 1971, when the average cohort was only 8 percent below expectations, (3) most of the loss in recent years has occurred in the birth to first grade interval, where there was an average loss of 14 percent from expected levels, (4) there is a steady increase in the private school contingent in the school age population, including 1st grade, where the private schools captured 20 percent of the entering cohort in 1978—79, a 9 percent rise in eight years.
>
> White flight also manifested itself as within-system migration. The analysis found that there is a flight of up to 49 percent in some cluster schools located in black areas from among white cohorts which began school in desegregated 1-4 schools. The loss in cluster area schools is congruent with a marked gain in non-court-ordered 1-6 grade schools in many outlying areas.

R. Pride, *Patterns of White Flight: 1971-1979*, at 14-15 (1980). His most disturbing statistical prediction was that we can expect 25-30 percent of the elementary age children to be in private school in the middle to late 1980s. If the goal of previous efforts has been to achieve an integrated school experience, the depress-

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[44] In June 1971, there were 66,393 white students in Metropolitan Nashville schools as opposed to 44,295 in June 1979.

ing reality of Dr. Pride's study[43] is that our efforts have been less than fruitful, if not to some extent counterproductive.

This phenomenon is only partially the result of the remnants of racial prejudice. From the testimony in this case, the Court concludes that other parental concerns have a greater impact than the bus ride or racial prejudice. It was apparent from the testimony, from letters received by the Court, from letters received by the Board, *see* Collective Exhibit 170, and from the public hearings conducted by the Board, *see* Collective Exhibit 205, that the greatest concern is with the quality of education received, or perceived to be received. It was testified repeatedly

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[43] An earlier study of Dr. Pride and Dr. J. David Woodard on the white flight phenomenon in Nashville, Memphis, and Louisville, entitled "Busing and White Flight: Implementation Plans in Three Southern Cities," was presented as Exhibit 246. In this connection, one should note that in the Coleman II Study, Exhibit 63B, Dr. James S. Coleman found that there is an almost inevitable significant loss of white children from public school systems when desegregation occurs. He concluded the analysis of his study by stating:

> that the emerging problem with regard to school desegregation is the problem of segregation between central city and suburbs; and in addition, that current means by which schools are being desegregated are intensifying that problem, rather than reducing it. The emerging problem of school segregation in large cities is a problem of metropolitan area residential segregation, black central cities and white suburbs, brought about by a loss of whites from the central cities. This loss is intensified by extensive school desegregation in those central cities, but in cities with high proportions of blacks and predominantly white suburbs, it proceeds at a relatively rapid rate with or without desegregation.

J. Coleman, S. Kelly & J. Moore, *Trends in School Segregation, 1968-73*, at 79-80 (1975). Dr. Coleman's description of cities in which the black population is concentrated in the central city and the suburbs are predominantly white applies to Nashville-Davidson County and is the crux of the problem in this county.

that the important factor is what happens at the end of the bus ride rather than how long the ride.

Except to the extent that the largely undefined (and unfunded) magnet portion of the plan may be so designated, there are no educational components to the plan. It is merely a student assignment plan to provide racial ratios. Such a further disruption without massive efforts to make the public school system more attractive will further deteriorate public support and will engender more flight to private schools. The witnesses for all parties predicted such an increase as an inevitable result of the plan, and the Court so finds.

Further, in consideration of the efficacy of the 1971 remedy and the hoped-for efficacy of the Board plan, the Court received testimony on the improvement in achievement test scores of both black and white children from 1971 to the present. *See* Exhibit 249. No scores were available before 1971 and thus no basis of comparison existed for pre-busing achievement. Different tests were utilized and the statistics for some years may not be comparable. However, there does appear to have been improvement in both black and white stanine scores in both math and reading over the period. The gap between black and white achievement has narrowed slightly, but average black achievement in both math and reading is still well below national norms and the gap between black and white achievement remains substantial.[46]

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[46] In 1978 the average reading gap ranged from 1.2 stanines in the second grade to 1.62 stanines in the eighth grade. Narrowing of the reading gap by grade level from 1971 to 1978 ranged from a .1 reduction in the sixth grade to a .65 reduction in the second and third grades. Improvement in recent years seems to have plateaued and little reduction appears after 1975. Exhibit 249. *See also* Report on Standardized Testing, prepared by the Board in February 1979, Collective Exhibit 240, in which the Board Reported that 77 percent of the public school students in this county achieved scores in reading and mathematics at a level average to or above the national test scores.

The "osmosis effect," or use of white children as a principal learning resource for black children, appears not to have had the desired result, at least in isolation. These data strongly suggest the necessity for educational components both as an essential ingredient to the remedy and also as a reinforcement to parental perception of, and *support for,* the system. As noted by the Supreme Court in *Milliken II,* and as is obviously present in this case, "[p]upil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures." *Milliken* v. *Bradley,* 433 U.S. 267, 287-88, 97 S.Ct. 2749, 53 L.Ed.2d 745, 760 (1977).

B. Disparity of Burden

The Court finds that the plan submitted by the Board disparately onerates young black children with the burden of achieving desegregation.

As noted above, with few exceptions, black children do not attend the same school for grade one as for kindergarten. Also with few exceptions, black children are bused out of their neighborhoods for grades 1-4, while white children remain in their neighborhoods for these early grades.

The Court drove the route from North Nashville to Andrew Jackson School. The route covers 20.6 miles and required 42 minutes. More significant, however, than the time or distance is the inaccessibility of the area by other than automobile. A child who becomes ill at school and needs a parent, or a parent who needs a conference with a teacher, will create a transportation problem requiring an expensive solution by taxi or a very time-consuming bus ride with transfers if the parent does not have an automobile. This defies logic and creates an almost impossible barrier to liason between parent and teacher. These children *never* attend a school in their neighborhood for the entire twelve years, unless they elect for the grades 1-2 Buena Vista option.

Similarly, young black children from the Cameron area are taken substantial distances to Una, Lakeview, Cole, and Haywood. Haynes area young black children travel to Old Center, Gateway, and Amqui. Wharton area young black children travel to the southeast corner of the county to Brookmeade, Gower, and Westmeade. Children in the area of Caldwell school (proposed for closure) would go to a yet undetermined school for kindergarten, travel to Baxter for grades 1-2, travel on out to Chadwell, Stratton, and Neely's Bend in 7-8 and Madison and Goodlettsville (or Goodlettsville-Madison Comprehensive High School) for 9-12. Black children in the shadow of Head Elementary School and Pearl High School would go to Head for kindergarten, travel out to Hill, Woodmont, Sylvan Park, or Eakin for 1-4, come back in to Head for 5-6, travel out again to Apollo for 7-8, and out again to Antioch for 9-12.

No similar treatment of white children exists.

C. The Social, Educational, and Economic Costs

The potentially devastating social cost of a public school system serving only the lower socioeconomic segments of our society has been alluded to earlier. The prospect of such divisiveness, and its probable geometric progression into post-school societal interaction, is frightening. Public education is the cornerstone of democracy, but public education without public support will almost certainly erode to the point that it will no longer represent this solid base upon which we can continue to build.

Dr. Pride's testimony is undisputed and is supported by other witnesses. The Board plan will not only fail to engender a revival of public support, it is also uniformly predicted to engender further exodus from the public school system. The

Court finds that such a result negates the efficacy of the remedy, and it is an unacceptable social cost.

The educational concessions made to facilitate achievement of desired ratios have also been referred to above. The choice of a four or five-tiered system over the educationally preferred three-tiered system is only one of these. The lack of continuity for the child and the difficulty of liason between parent and teacher occasioned by the use of noncontiguous zoning, particularly in the early grades, is an admitted educational detriment. The inability of the child from noncontiguous zones to participate in extracurricular activities after school is a further admitted educational cost of the plan. The allocation of a finite amount of resources to transportation costs rather than educational improvement is inherent in the plan. Dr. Bill Wise, Assistant Superintendent of Schools and a principal witness for the Board, testified that elimination of the cost of transporting students in the first four grades would be sufficient to reduce the pupil-teacher ratio from 25 to 1 to 15 to 1 in those grades. The overwhelming testimony from the educator experts was that the remedial benefits of smaller pupil-teacher ratios in these early grades would far exceed any benefit obtained from an "osmosis" effect. Such educational costs weigh heavily in the balance of this consideration of the efficacy of the remedy.

The Board plan would add transportation costs of $3.5 million with the use of elementary magnet . (Exhibit 193). This Court judicially notices the existence of a national fuel crisis as well as a serious downturn in the economy. Fuel prices are many times what they were when the plan was implemented in 1971. Some transportation will continue to be necessary. However, rational balancing of cost-benefit demands a consideration of alternative methods of transportation that may be more efficient, and alternatives to transportation as a remedial device.

For all of the above reasons, the Court must reject the Board's proposed plan. The intervenors' plan, although it of-

fers attractive and creative ideas, must also be rejected because of its lack of refinement and the flaws noted in Part VIII above.

The Court lacks the resources to devise modifications to either the Board's plan or the intervenors' plan or to develop an alternative plan on its own. It is necessary, therefore, to refer the plan back to the Board under more specific guidelines. Such a re-referral may result in a deferral of implementation of parts or all of the plan for the coming school year 1980-81. Upon a consideration of this opinion and the guidelines hereinafter set out, the Board will report to the Court by July 1, 1980, on the feasibility of the generation of a new plan for the 1980-81 school year or any parts thereof and the necessity for deferral of development and/or implementation of any such parts.

XI. GUIDELINES AND SPECIFIC DIRECTIVES

A. Tier Structure

[4] The Board chose a four-tiered structure against its better educational judgment in order to facilitate racial balance. In view of the directive which follows this, the Board may now revert to a three-tiered structure. Whether this should be a K4-4-4 or some variation thereof which is more educationally sound and makes better utilization of buildings is a matter for Board determination.

B. *K-4 (or variation) of a Neighborhood Character*

As recognized in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra,* transportation of young children which "risk[s] the health of the children or significantly impinge[s] on the educational process" is to be avoided. 402 U.S. at 30-31, 91 S.Ct. at 1283, 28 L.Ed.2d at 575.

For all of the reasons set forth in the findings above, the Board should construct its first tier of kindergarten through early elementary grades of a neighborhood character. Intervenors attempted such a construction under severe time constraints. The expert staff of the Board can do a more refined job, drawing lines that achieve better utilization of space, considering the need for kindergarten, special education, and other federally funded programs, and also maximizing the opportunities for integration.

C. Middle Schools

A 5-8 (or variation) middle school tier shoud be constructed which clusters schools from the first tier, but with the objective in clustering of bringing about a minimum presence of at least 15 percent of either race in the minority at each middle school. If necessary to meet this objective, noncontiguous zones may be utilized. These should be held to a minimum and where utilized, consideration should be given to assignment of the nearest such black or white children to create such presence. In this respect, consideration should be given to transportation accessibility by public transportation between the noncontiguous zone and the assigned school, as more fully discussed below. The school chosen for the middle school in each cluster should be as centrally located as possible to the whole of the students assigned thereto. Exceptions to this objective may be dictated by the location of buildings large enough to accommodate the student population.

The selection of 15 percent is arbitrary, as is any other number which may be chosen. Preparation of students to live in a pluralistic society makes a biracial, intercultural experience highly desirable. However, it was not the intent of *Brown* and its progeny to require blacks always to be in the minority; nor should these precedents have been read to require assimilation or amalgamation. It is not undemocratic, nor does it violate

equal protection of the laws to have a system that allows for recognition of and respect for differences in our society. A rigid adherence to racial ratios premised upon the social goal of assimilation, which in the process demeans, diminishes, or benignly neglects cultural and ethnic pride as well as differences, is not only constitutionally unrequired, but socially undesirable. (*See* testimony of Dr. Walter Leonard.) The 15 percent minimum objective was chosen at the suggestion of plaintiffs because it seems to represent a reasonable attempt to provide intercultural and interracial contact as a foundation for social harmony. As such it is a goal worthy of the wholehearted support of parents and the community, and for the attainment of which some expense and inconvenience should gladly be endured.

D. High Schools

The Board's initial plan after 1971 (with tacit approval from the Court at that time) of ringing the city with comprehensive high schools would have brought about complete desegregation. Had the job been completed and had there not been some errors of judgment in school placement, much of the present controversy could have been avoided. Ethnic attachment and insistence on the retention of Pearl, and community and parochial insistence upon the retention of Pearl, and community and parochial insistence upon the retention of Bellevue, Joelton, and Cohn have created political problems for the Board in the pursuit and implementation of its comprehensive program. The remoteness of Antioch and DuPont has created logistical problems and impeded efforts that would have further implemented this educational decision. Controversy has arisen concerning the validity of comprehensive high schools as an educational vehicle. Some community pressure has been exerted for at least a partial return to, or the option of, a smaller, traditional high school. Intervenors suggest through their equity plan

the provision of such an option. Their suggestion has both educational merit and offers the hope of renewed support for the system. They err in the excess, however, from a desire to please as many as possible. By proposing the maintenance of all existing high schools, intolerable resegregation results, protected enclaves persist, and, pragmatically, serious underutilization of space is inevitable. The Board should consider the use of some traditional type high schools either as magnets per se, or containing magnet programs. Pearl, East, and West End appear to be well located geographically for such a magnet approach. All are in or near the central city and are served by public transportation. The number and location of such magnet-traditional high schools is a matter for Board determination in the exercise of its educational function and in consideration of financial constraints.

1. *Goodlettsville-Madison-Trinity Hills*

This proposed new comprehensive high school has been recommended by the Board since 1972. Land has been acquired. Building age and overcrowding have threatened loss of accreditation to existing high schools in the area served. This construction was a part of the initial plan of the Board for a ring of comprehensive high schools and promises to aid substantially in achieving desegregation. It should be built and the Court approves this portion of the Board's plan with attendance zones set out in Exhibit 14B. However, as discussed *infra*, the Board should include in the attendance zone and construct accommodations for the Old Hickory area (northern half of DuPont zone) in this school. These children can cross the river at Old Hickory Boulevard and are as close or closer to the site as most of the remainder of the zone. There is natural affinity between the Old Hickory and Madison communities. Such a zone modification will relieve overcrowded conditions in the DuPont zone, offer comprehensive education to the children in this

zone, and will further integration without the use of the present noncontiguous zone for DuPont from inner city North Nashville. The lower half ot he DuPont zone can be assigned to McGavock.[47]

2. *Pearl-Cohn Inner City Comprehensive High School*

The Board has determined the advisability of an inner city comprehensive high school and proposed to construct it in the approximate center of a zone now served by Pearl and Cohn High Schools. Although the economic justification may be subject to some question,[48] other considerations weighed heavily with the Board and are equally persuasive to the Court. Both Pearl and Cohn have a long and rich heritage of service to their communities. Both have provided outstanding graduates to the region and the nation. Adjoining as they are geographically, they will bring together a natural racial mix that will enhance the desegregation effort. The combination of names and communities will preserve the symbolic significance of the predecessor schools, and will provide an inner city structure offering comprehensive education to a contiguous and natural zone. Assignment of children in North Nashville (presently

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[47] In 1983, DuPont is scheduled for only grades 10-12 with a population of 967 and a capacity of only 784. McGavock will have 438 empty seats. The addition of some seats to Goodlettsville-Madison-Trinity Hills, plus the relief to be anticipated from some students attending magnet high schools should easily accommodate these DuPont area students. In addition, the DuPont anticipated student body includes students from a noncontiguous zone in North Nashville which will be discussed in the next section. Such a solution eliminates the need for $1,365,000 expenditure for an addition to DuPont. Exhibit 193.

[48] *See* discussion of the availability of seating projected for Hillwood, Hillsboro, and Overton, note 49 *infra*. However, with the closure of Bellevue, Antioch, and DuPont as hereinafter discussed, and with the assignment of students from the noncontiguous zones in the natural Pearl-Cohn area from Antioch and DuPont back to a Pearl-Cohn Comprehensive High School, this excess capacity will not be as present.

assigne to distant DuPont) and children from the Pearl-Head area (presently assigned to distant Antioch) will increase student and community identity with the school, and reduce transportation costs. Adjustment of the southern boundary of the zone, *see* Exhibit 164, to West End Avenue will increase the white percentage of students.

The construction of Pearl-Cohn Comprehensive High School is approved.

3. *Bellevue, Antioch, DuPont, Joelton*

These relatively small high schools in the outer fringes of the county have posed a problem to the Board both in implementation of its comprehensive high school plan, and in its efforts to achieve a desegregated system. There has been understandable community resistance to their closure. Attempts to bring about a black presence in Antioch and DuPont have necessitated distant noncontiguous zones and excessive transportation costs. All four of these noncomprehensive schools should be closed or converted to middle school or other uses.

Whites Creek was built to accommodate Joelton students. Hillwood was built to accommodate Bellevue students. Antioch students can be accommodated between Glencliff and Overton.[49] DuPont area students can be accommodated between the new Goodlettsville-Madison-Trinity Hills Comprehensive High School and existing McGavock.[50]

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[49] In the 1963 projection (Exhibit 155) Glencliff will have 308 empty seats and Overton will have 483 empty seats. Antioch is projected to have 1295 students, including 263 students from the noncontiguous Pearl-Head area zone. Excluding these students after their assignment to Pearl-Cohn, *see* section 2 *supra*, there would be 241 more students at Glencliff and Overton above capacity. Some adjustment of zone lines may be necessary from Overton to Hillsboro, which contains 792 empty seats, or the overage may be taken care of by the magnet schools, discussed in section E *infra*.

[50] McGavock is projected to have 438 empty seats in 1983.

4. *Proposed Addition to Maplewood*

In the Long Range Plan, with the building of Goodlettsville-Madison-Trinity Hills, Maplewood is projected to have a student body of 1734, 54 percent black, and a permanent capacity of only 1091 plus 499 portable classroom spaces. (Exhibit 155). The Board, therefore, proposes to build a $4,775,000 addition to Maplewood to accommodate 700 students. Since this decision does not affect desegregation efforts, the Court does not either approve or disapprove the proposal. However, adjacent Whites Creek will have 372 empty spaces in the same Long Range projection. If East is opened as a magnet school, much of this overcapacity should also be relieved. Cost consciousness and prudence would seem to dictate a delay in this capital expenditure to determine if zone adjustments to Whites Creek and magnet enrollments do not obviate this problem.

5. *DuPont High School*

As noted above, DuPont should be closed. The proposed addition of $1,365,000 to this fringe area school would further frustrate efforts to achieve desegregation. This expansion is disapproved.

E. *Magnet Schools*

The use of magnet schools as an adjunct to a pupil assignment plan not only offers a voluntary component to the desegregation plan but also adds significantly to the quality of the educational offering. It has proven effective in a number of cities as a method of achieving voluntary integration.[51] Intervenors demonstrated a substantial desire on the part of many residents of the county for the option of more traditional-type high schools. It appears that the utilization of magnet-type pro-

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[51] *See* N. Estes & D. Waldrip, *Magnet Schools: Legal and Practical Implications* (1978).

grams contained within several such traditional high schools, would be a significantly beneficial component to the plan. If these traditional high schools were open-zoned, centrally located, accessible by public transportation, offering unique educational opportunities, they should attract an integrated student body. Pearl, East, and West End all seem to meet these criteria. Pearl in particular should be considered for such alternative use. It is an attractive, functional building, accessible by several MTA routes. Such a usage would preserve the building as a source of black pride and symbolism in the North Nashville community. East and West End offer similarly attractive locations and existing facilities. Different magnet programs for each school should be considered.

This component of the plan is left to further development by the Board. Substantial savings should result from decreases in transportation costs in the elementary grades, from use of MTA services, discussed *infra,* and from reduction of noncontiguous zones. These resultant savings should be applied to this and other educational components of the newly devised plan.

F. *Transportation*

1. *Use of Metropolitan Transit Authority [MTA]*

One of the most appealing parts of the intervenors' plan was the proposal for close cooperation with and maximum utilization of the MTA system. It was shown that in many instances, MTA buses travel out toward suburban schools in the mornings virtually empty in order to bring commuters into the city to work. This is generally near school starting time. In the afternoons, MTA buses travel out with some of the same commuters only to return empty. It was further pointed out, and alluded to earlier in this opinion, that the availability of MTA transportation to a school tends to eliminate a feeling of alienation from the school, enhance the opportunity for parent-teacher liason, and open opportunities for after-school participation in ex-

tracurricular activities. MTA could establish feeder lines to operate in conjunction with shuttle buses and thereby reduce the number of buses and drivers required by the Board. The opportunities for cooperation and substantial savings in transportation cost are many. They await only imaginative exploration by transportation experts for the Board and the MTA.

The Court is assured of MTA cooperation. The Court directs the Board to immediately initiate and pursue discussions with MTA and to incorporate maximum utilization of public transportation in the design of the middle school plan and high school transportation services.

One of the major deficiencies of the present plan and the Board's proposed plan is the absence of any consideration of transportation for students who desire to participate in after-school, extracurricular activities. The plan must incorporate a reasonable accommodation of this essential component of an education.

Discussions with MTA and planning for open-zoned magnet schools must also consider public transportation as a complement, if not the primary resource, in achieving access to such magnets.

G. *Educational Components*

1. *Elementary Schools*

Substantial savings will accrue from the elimination of transportation for racial balance in the elementary schools affected by this order. Savings realized from this source should be utilized for educational improvement throughout the system. The Board shall consider and report its recommendations for educational components to the plan to the Court. Such educational components should be directed toward:

1. Provision of intercultural experiences on a periodic basis to those K-4 children who, because of lack of integrated housing in

their zoned neighborhoods, are in largely black or largely white elementary schools;

2. Reduced pupil-teacher ratios in those schools in which the achievement level of the school is below the average for the system;

3. Remediation efforts in those schools or classes within schools made up largely of socioeconomically deprived children who suffer the continuing effects of prior discrimination;

4. Such other areas as the professional staff may recommend and the Board may consider valid in developing ways to attack the problem of disparate achievement between black and white children, and, in general to improve the quality of education in Metropolitan Nashville-Davidson County.

2. *Curriculum on Black History and Culture*

Plaintiffs persuasively represented that this area of education has been largely ignored. The contributions of the black men and women of this country to the progress of our nation is a source of inspiration to children, black and white. The Board responded with a broad brush assertion, without specific examples, that such instruction has been generally incorporated into the curriculum. No evidence was offered that this is being done in a meaningful way or that its implementation was monitored to insure its realization. The plan of the Board will specifically address this question and propose methods of monitoring inclusion of such subject material into the regular curricula, as well as the offering of specific courses on black history and culture in the comprehensive high schools.

3. *In Service Training and Teacher Assignment*

The Board's proposed professional development program, "Together We Can-Together We Will," Exhibit 254, outlines a positive approach to development of understanding, sensitivity,

and cooperation in the implementation of a desegregation effort. It represents a good start. The Board and its staff should study further efforts in this regard and propose as a part of the revised plan specific efforts toward:

1. Insuring that teachers and staff are required to undergo sensitivity training to the special needs of black children from an underprivileged social environment; and

2. Insuring that the most sensitive of such teachers are assigned to those schools and classes where the desegregation experience is likely to be most problematic.

H. *Faculty-Staff Ratios*

Consideration of black-white ratios in the composition of faculty and staff was reserved until a later stage of the proceedings. Nevertheless, some testimony with respect thereto crept into the hearings thus far. Pending further hearings, the revised plan of the Board should include an affirmative action recruitment and hiring program that emphasizes the replacement of vacancies occurring by normal attrition with black personnel.

I. *Involvement of Plaintiff and Intervenors*

The Court has been impressed by the generosity of spirit and cooperative attitude demonstrated by the parties and counsel throughout the hearings on the matter. The Court believes this manifestation of good faith and common desire to achieve a workable solution to difficult problems is representative of the enlightened attitude of the great majority of the general populace of this county.

It is a solid foundation on which to build and we must nurture the climate thus created. In this regard the plaintiffs and intervenors are each directed to designate at least one represen-

tative of their choosing to attend regularly scheduled work-discussion sessions with staff members of the Board who are responsible for preparation of the report ordered by this Court on July 1, 1980. Utilization of these persons as a resource, and information relayed from them back to the parties can faciliate finalization of a plan and continue to foster the spirit of cooperation. It is not necessary to reiterate the non-adversarial, non-traditional character of the effort in which we are engaged.

J. *Involvement of the Community*

It is the fervent hope of this Court, in its official capacity, and in its unofficial capacity as a resident and parent, that the plan which eventually emerges from these efforts will be one which promotes equal educational opportunity, enhances interracial and intercultural communication and understanding, and improves the quality of education offered to all the children of this community.

To insure the success of the plan, the success of public education in Davidson County, and the success and happiness of our community in the future, it will be essential to enlist and utilize the good will and support of the community. The Board should develop a plan to enlist the aid of such groups as The League of Women Voters, Leadership Nashville, Metropolitan Nashville Community Education Alliance, the Metropolitan Mayor and Council, the media, civic and service organizations, to name only a few of the infinite resources available.

APPENDIX D

Robert W. Kelley et al.

v.

Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.

v.

State of Tennessee et al.

Nos. 2094, 2956.

United States District Court,
M. D. Tennessee,
Nashville Division.

April 17, 1981.

In a school desegregation case the board of education proffered its desegregation plan to which plaintiffs objected and proposed their own plan. The District Court, Wiseman, J., rejected plaintiffs' proposed plan as haphazardly constructed and unworkable and approved board's plan which included educational components and pupil assignment components.

Board's plan ordered adopted.

1. Federal Civil Procedure (key) 1127

Where on its face, the elementary portion of plaintiffs school desegregation plan was nothing more than an attack on order directing board of education to develop a new plan following certain specific directives and guidelines and it was contrary to plaintiffs own expert proof, such was stricken as impertinent and unresponsive to the court's directive. Fed.Rules Civ.Proc. Rule 12(f), 28 U.S.C.A.

2. Schools (key) 13(6)

Board of education's desegregation plan, which consisted of educational components and pupil assignment components, rather than plaintiffs plan was adopted where plaintiffs plan apparently was hastily drawn while board's plan, with modifications, met concerns with K-4 remediation, multicultural intercultural exchange, magnet schools, teaching of black history and middle schools and attendance zones were drawn to comply with mandate to achieve a minimum of 15% representation by race in middle schools without undue transportation burden on minority students.

Avon N. Williams, Jr., Richard Dinkins, Nashville, Tenn., for plaintiffs.

William R. Willis, Jr. and Marian F. Harrison, Nashville, Tenn., for defendant Metropolitan Bd. of Ed.

Frank J. Scanlon, Senior Asst. Atty. Gen., Nashville, Tenn., for third-party defendant State of Tenn.

MEMORANDUM

WISEMAN, District Judge.

This Court's Memorandum Opinion and Order of May 20, 1980, directed the Defendant Board of Education to develop a new desegregation plan following certain specific directives and guidelines regarding educational components and pupil assignment as set forth in that Opinion.[1] Those directives and guidelines resulted from many days of testimony beginning in the summer of 1979, and culminating in over 25 trial days in March and April of 1980. After the lengthy hearings, this Court

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[1] *See, Keiley* v. *Board of Education,* 492 F.Supp. 167 (M.D.Tenn. 1980).

determined that a different remedy for the remaining vestiges of segregation in Nashville was required, in view of the "tortuous twenty-five year history of desegregation efforts in Metropolitan Nashville," and the specific burdens and benefits found to emanate from the *Swann* remedy ordered by this Court and implemented by the Defendants in 1971. This Opinion considers the plan offered in the Board's effort to comply with the May 20, 1980, Order, and the Plaintiffs' proposals and objections relating to the ordered plan.

THE RECORD PRIOR TO THE 1981 HEARINGS

Prior to this Court's Order of May 20, 1980, many matters had gone unresolved in this litigation since 1971.[2] The Plaintiffs had filed several objections to the operation of the Court-ordered 1971 plan, which objections were addressed primarily to alleged disparate burden in transportation of young black children. As a result of these objections, along with other factors such as the Board's need for additional classroom space in the outlying areas not involved in the 1971 plan,[3] and the ever-increasing costs of transportation under the plan, the Court ordered the Board, on August 27, 1979, to develop a new desegregation plan for the entirety of Davidson County.[4] After many weeks of Board deliberation and community input at the Board level, the "Waldrip Plan"[5] was presented for the Court's

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[2] *Kelley* v. *Board of Education,* 492 F.Supp. 167, 168-75 (M.D.Tenn.1980).

[3] The 1971 *Swann* remedy left a ring of schools in the outlying areas untouched by the plan because of the distances involved in transportation to and from these schools.

[4] *Kelley* v. *Board of Education,* 479 F.Supp. 120 (M.D.Tenn.1979).

[5] The planning team for the Board was headed by Dr. Donald Waldrip, whose qualifications were set forth in the Court's Memorandum Opinion of May 20, 1980. *Kelley* v. *Board of Education,* 492 F.Supp. 167, 177 (M.D.Tenn.1980).

scrutiny. The Plaintiffs were invited by the Court to submit an alternative plan, but this offer was ultimately declined. Instead, the Plaintiffs chose to rest their case on specific criticisms leveled at the Waldrip Plan by the Plaintiffs' expert witness, Dr. Hugh Scott. A group of intervenors were also permitted to file a plan.

Consideration of the two plans, along with the Plaintiffs' objections, resulted in the Court's rejection of both plans, and in the Court's directive to the Board to develop another plan following the specific guidelines set forth in the Court's Opinion. Based on the testimony offered during the hearings on the two plans, this Court made an effort to carefully balance the benefits and burdens imposed by the *Swann*-type remedy employed in the 1971 Order and in the Waldrip Plan, and set forth the following directives for inclusion in the new Board proposal:

I. *Educational Components.*

A. Intercultural experiences for children in predominately one race schools.

B. Reduced pupil-teacher ratios in schools having achievement levels below the average for the system.

C. Remediation efforts in schools or classes made up largely of socioeconomically deprived children who suffer the continuing effects of prior discrimination.

D. Black history and black culture curriculum.

E. Teacher in-service training in preparation for the implementation of the plan.

F. Magnet school(s) offering unique educational opportunities.

G. Middle school programs.

II. *Pupil Assignment.*

A. A three-tiered system of grades utilizing K-4, 5-8, 9-12, or some reasonable variation thereof.

B. Schools having a neighborhood character for the lower elementary grades without the use of non-contiguous zoning arrangements.

C. Middle schools having a minimum 15% representation of either race, utilizing non-contiguous zoning where necessary.

D. Use of the closest other race population for necessary non-contiguous zones.

E. High school zones in conformity with the Court's directive, including closing and/or changing the use of Bellevue, Joelton, DuPont, Antioch, Madison, Pearl, and Cohn high schools.

F. Construction of the Goodlettsville-Madison and Pearl-Cohn comprehensive high schools, with the corresponding closure or change in use of Goodlettsville, Madison, Pearl, and Cohn.

G. Delay the addition to Maplewood High School and consider adjustments to the Whites Creek zone and the impact of proposed magnet school enrollments to acommodate the large enrollment at Maplewood.

On June 25, 1980, the Defendant Board of Education made a preliminary report to the Court regarding a timetable for implementation of the Court's Order. Pursuant to what the Board representatives deemed to be the suggestion of the Plaintiffs, the Board's proposed timetable included a plan where first graders could remain in the school wherein they attended kindergarten, thereby presumably aiding in the transition be-

tween kindergarten and first grade.[6] A hearing was held on the proposed timetable for implementation, and the Plaintiffs objected to the rezoning of first graders during the interim. Following the hearing on July 15, 1980, the Court entered an Order rejecting the first grade proposal, approving the remainder of the timetable for the pupil assignment components, and relieving the Defendants of the obligation to confer with representatives of the Plaintiffs and Intervenors during the planning process.[7]

The Board filed its proposed desegregation plan on January 19, 1981.[8] Following the filing, this Court directed the Plaintiffs and the Intervenors to respond by way of specific objections to the plan by February 9, 1981. The Intervenors moved for leave to withdraw from active participation in the hearings on the new plan, and this motion was granted.

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[6] Dr. Hugh Scott, expert witness for the Plaintiffs, testified extensively about the need for a smooth transition between these grades.

[7] The Court also ordered the Board to reconsider its decision to permit 12th graders to remain at Bellevue and Joelton, while closing those high schools to other grades pursuant to the Court's directive. The Board subsequently voted to close those schools as high schools for the school year 1980-1981, which was reported to the Court on July 25, 1980.

[8] Counsel for the Board noted in a response to the Plaintiffs' later request for additional time to respond to the plan and in the hearings on March 30, 1981, that the Plaintiffs had access to the plan long before January 19, 1981. Specifically, Board counsel stated as follows: Details of the proposed plan were widely aired in public meetings during November and December, 1980. On or about December 15, 1980, after the approval of the long range pupil assignment plan by the Board, a copy of the statistical data supporting the plan was forwarded to the Plaintiffs, and an invitation to view the bulky maps, which had not yet been duplicated, was extended to the Plaintiffs by Board counsel. The entire package of maps and statistical information was forwarded to the Plaintiffs on or about January 12, 1981, with the remainder of the plan, including the interim proposals and educational components, being delivered to the Plaintiffs on January 19, 1981. No exception was taken to this representation of the events by Plaintiffs' counsel.

On or about February 6, 1981, the Plaintiffs moved the Court for additional time to file objections up to and including March 31, 1981. Accompanying that motion was an initial submission of objections, and an indication that the Plaintiffs had not been able to meet with one or more possible expert witnesses regarding the plan. The motion was granted in part, extending the time for responding until March 16, 1981, with the notation that any hearings, if necessary, on the plan and objections would begin on March 30, 1981, and would continue thereafter until concluded.

On March 10, 1981, the Plaintiffs filed a second motion for extension, based on the fact that the Plaintiffs' lead counsel was ill and hospitalized. From this motion, and from a status conference on or about March 10, 1981, attended by Plaintiffs' counsel, this Court and the Defendants learned for the first time that an alternative plan was contemplated by the Plaintiffs. The request for an extension was granted until March 25, 1981, giving the Plaintiffs leave to reapply for an extension if counsel's health had not improved. The Order contained a further notation that hearings remained scheduled for March 30, 1981.

On March 25, 1981, the Plaintiffs filed their supplemental response, along with an alternative plan. On March 27, 1981, the Defendants moved to strike the Plaintiffs' plan and to affirm the Board's plan without a hearing. The Court then ordered a hearing on all pending motions for determination of status of the case for March 30, 1981.

THE PLAINTIFFS' PROPOSED PLAN

On March 30, 1981, the Court heard the Board of Education's "Motion to Strike Plaintiffs' 'Conceptual' Pupil Assignment Plan and to Approve Defendants' Proposed Plan Without Hearing." The Court construes this motion as one made under Rule 12(f), Federal Rules of Civil Procedure, as a motion to strike "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

The primary basis for the Board's motion to strike the Plaintiffs' plan and certain objections to the Board's plan is that the primary thrust of the Plaintiffs' response constitutes an attack on the Court's Order of May 20, 1980, rather than an effort to produce a plan to comply with the Court's Order. In addition, the Board argues that the Court's Order of May 20, 1980, was in large measure based upon the testimony of the Plaintiffs' own expert witness, Dr. Hugh Schott. An examination of the Plaintiffs' plan and many of their objections reveals that the Board's position is substantially correct.

The Plaintiffs' proposed plan recognizes from the outset that elementary children will be transported long distances outside their neighborhoods, contrary to the Order of May 20, 1980. Furthermore, the elementary pairings were developed so as to closely approximate the current ratios existing in the community. The pairings and clusterings necessitate at least a four-tiered grade structure (which is inconsistent with the position taken by the Plaintiffs at the hearing), with students attending at least two elementary schools, one middle school, and one high school. Some students would attend three elementary schools since kindergarten is often separated from grades one and two. (Exhibit 284, offered for Identification).

In designing their elementary and middle school pairings and clusterings, the Plaintiffs have used the same method rejected by the Court in the form of the Waldrip Plan previously presented by the Board. Both the Waldrip Plan and the Plaintiffs' plan use "more-of-the-same remedy" employed by the Court in 1971, and rejected by the Court in 1980.[9] This Court made a specific factual finding that this remedy is no longer ap-

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[9] This is where that similarity stops, however. The Waldrip Plan was fully fleshed out with improved feeder patterns and as little transportation as possible under a proposed *Swann*-type remedy. This is not the case with the Plaintiffs' plan.

propriate in Nashville, after carefully weighing benefits against burdens and the nine year operational history of the school system under the *Swann*-type remedy.

A large portion of this Court's Order of May 20, 1980, consisted of this balancing process—weighing the benefits of the *Swann*-type remedy against its burdens. The costs and burdens were largely derived from the testimony of Dr. Hugh Scott, the Plaintiffs' expert witness. He testified to the educational importance of a three-tiered school system, and the deleterious effect of disrupting a child's early education by splitting the primary grades among different schools. He testified further to the importance of parental involvement in early childhood education, which he felt could only be fostered by having the schools in such a location that the parent could frequently visit the school, talk with teachers, become personally involved, and contribute services. He also testified that the "osmosis effect" or "rightness of whiteness" approach to desegregation mandating a given racial percentage in each school and rejecting predominately black schools was inherently racist and without educational validity.

[1] This Court was impressed by Dr. Scott's testimony and relied upon it, only to have an elementary school plan proposed by the Plaintiffs which was totally contrary to this most persuasive testimony. Since the elementary portion of the Plaintiffs' plan on its face constitutes nothing more than an attack on the Court's Order of May 20, 1980, and is contrary to the Plaintiffs' own expert proof, it is stricken as impertinent and unresponsive to the Court's directive under Rule 12(f), Federal Rules of Civil Procedure.

While the obvious failure of the Plaintiffs' elementary school proposal to comply with the Court's Order of May 20, 1980, precluded testimony on that portion, the Court did permit the Plaintiffs to present their middle school plan, which their new

expert witness, Dr. William M. Gordon,[10] stated was independent of the elementary school portion.[11]

Throughout Dr. Gordon's testimony, it was apparent that all portions of the Plaintiffs' proposed plan, including the middle school plan, were hastily drawn by consultants[12] who had little or no familiarity with the demography, the major arteries, the location of children, the capacities of buildings, and other pertinent information. Further, the consultants who participated in the drawing of the Plaintiffs' plan did not take time to study these variables or to visit the city for any appreciable length of time. Dr. Gordon admitted that an entire chapter of his book regarding desegregation in America was devoted to the importance of knowing these crucial details regarding a city when preparing a desegregation plan.

The Plaintiffs' middle school plan is superficial at best. The consultants merely paired the Board's proposed elementary zones into middle schools, with a total lack of regard for building capacities and the distances between non-contiguous zones for the schools. No projected enrollments were set forth in the Plaintiffs' plan, and accordingly, it was impossible to evaluate how well the mechanics of the system would work. Mr. Ray Osborne, Director of Zoning and Real Property for the

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[10] Dr. Gordon is a Professor in the Department of Educational Leadership, Miami University, Oxford, Ohio. (Exhibit 280). He is a member of HGH Associates, an educational consulting firm specializing in desegregation plans.

[11] The Plaintiffs did not propose an alternative high school plan, thus apparently accepting the Board's proposal for high schools.

[12] In addition to Dr. Gordon, see note 10, *supra*, Dr. Larry W. Hughes (Exhibit 281), and Dr. James B. Andrews (Exhibit 282), participated in the drawing of the Plaintiffs' desegregation plan. Dr. Hughes and Dr. Andrews are also members of HGH Associates.

Board of Education, calculated enrollments for the Plaintiffs' middle schools and found numerous schools to be overcrowded.[13]

An examination of the map depicting Plaintiffs' middle school plan (Exhibit 266), reveals numerous instances of unreasonable zoning arrangements for both races. For example, students in the Cumberland non-contiguous zone on the Sumner County line would be required to ride to a zone on the Cheatham County line to attend Cumberland. Students in the Antioch non-contiguous area in the innercity would be transported to Antioch in southwest Nashville. Students in the Joy and Stratton areas would be transported across the Cumberland River to Donelson. Students in the Ross area near the central city would be required to ride to Goodlettsville. Other pairings are similarly unreasonable,[14] but in all there is an apparent disregard for distances, for the location of rivers, for bridges, and for major thoroughfares. On cross-examination, Dr. Gordon could not show the Court how a bus would travel from one of these distant zones to another, thereby indicating a total lack of familiarity with such practicalities.

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[13] For example, it was calculated that Meigs Middle School would have an enrollment of 1348, with a capacity of 850, that Rose Park Middle School would have an enrollment of 1235, with a capacity of 690, that McMurray would have an enrollment of 1280, with a capacity of 926. Other schools were apparently severely underutilized. For example, Moore would have an enrollment of 404, with a capacity of 906, Pearl would have an enrollment of 852, with a capacity of 1295, and Cohn would have an enrollment of 744, with a capacity of 1136.

[14] In addition to those set forth in the text, see the remaining pairings on the map, Exhibit 266:

Wright	—	Glencliff, Early, Brookmeade
Meigs	—	Warner, Glengarry, Hickman, Haywood
Apollo	—	Una, Kirkpatrick, Fall-Hamilton
Rose Park	—	Carter-Lawrence, Berry, Lakeview

The middle school plan also fails to abide by the Court's Order of May 20, 1980, as well as the testimony of Dr. Scott, the Plaintiffs own expert witness. Indeed, the testimony of Dr. Gordon revealed that his "theory" of desegregation was totally contradictory to that of Dr. Scott. While Dr. Scott had previously rejected the racial balance approach, had attacked the validity of the theory that black children must sit beside white children to learn, and had applauded the idea that black schools were not inherently bad, Dr. Gordon's testimony and the middle school plan presented by the Plaintiffs take the opposite position.

Dr. Gordon and his associates sought specifically to structure school zones reflecting the racial makeup of the community. Blacks are in the majority in only one of the Plaintiffs' proposed 24 middle schools.[15] In drawing the zone lines in this fashion, Dr. Gordon created the impractical transportation routes described above. The Plaintiffs' plan does not comply with the Court's order that middle schools should have a minimum of 15% either race, which was a modification of the racial balance approach based on the Plaintiffs' previous position expressed by their expert witness, Dr. Hugh Scott.

From all of the above, it is apparent from the middle school plan, as from the elementary school plan, that the Plaintiffs have not complied with the Court's Order of May 20, 1980. The plan they have created is at best haphazardly constructed and unworkable. Accordingly, the Plaintiffs' middle school plan is rejected.

THE BOARD'S PLAN

[2] As the Court decreed in its Order of May 20, 1980, the Board of Education's plan consists of two parts—the educational components and the pupil assignment components.

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[15] Pearl.

I. *The Educational Compontents.*

The responsibility for developing the educational components was divided into six bi-racial committees of central office staff members, teachers, and citizens, for each the various subcomponents: (1) K-4 remediation; (2) multicultural/intercultural exchange; (3) magnet schools; (4) black history; (5) middle schools. (Exhibit 273). The timetable for development of the various components was approved by this Court on July 15, 1980, and the committees' work has substantially complied with the time frame set forth, with the possible exception of the magnet school proposal discussed more fully, *infra.*

In line with the Court's directive, the Board has proposed a K-4 Intervention/Remediation Program, which will be directed toward those schools or classes where the achievement levels are below the average for the system and/or where the majority of a school's population is made up largely of socio-economically deprived children who suffer the continuing effects of prior discrimination. The cornerstone of this proposal is the transition class whereby students who meet the Court's criteria and who are unable to perform at grade level in the normal classroom setting will be placed in a transition class at the end of kindergarten and/or first grade. The students will stay in these half-step classes for one semester or the entire year, depending upon their needs. Here, pursuant to the Court's directive, adult-student ratios will be lowered, and the cost borne in part by decreased transportation costs associated with the K-4 schools having a neighborhood character.[16] Ms. Lucille Nabors, Assis-

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[16] In the Board's pleading accompanying their plan is the notation that on January 13, 1981, the Board of Education adopted a resolution made by Mr. George Cate and seconded by Mrs. Barbara Mann regarding funding of the educational components. This motion reads as follows: "I move that the Board adopt as a policy that to the extent that money is saved in 1981 and later years in transportation by adoption of the K-4 neighborhood plan, that such funds be applied to the educational component of the plan with priority to the K-4

tant Superintendent for Program and Staff Development, testified at length about these programs, and stated that they were ready for implementation in those elementary schools included in the approved interim plan, discussed *infra*. Other remediation programs planned by the staff include basic development curriculum in math, language arts, and reading. (Exhibits 277, 278, part 1, pp. D-1—D-4, and part 2).

The Plaintiffs filed only two objections relating to the intervention/remediation program. Specifically, plaintiffs argued that the program should not be limited to grades K-4, and that it should not be paid for with Title I funds. (Objection 1(d), March 25, 1981, and Objection 1(e), March 25, 1981). From the exhibits and from the testimony of Ms. Nabors, it is apparent that remediation efforts in the system are currently directed toward all grades. (See Exhibit 278, part 1, at D-1). However, the Court's Order was directed only to remediation in grades K-4, in order to maintain the delicate balance set forth in that Order.[17] Moreover, inherent in the Court's Order is the recognition that when remediation is effective in the lower grades, there should be less need for it in the upper grades.

Plaintiffs' objection regarding Title I funds is also not well taken. Ms. Lucille Nabors testified that the Defendants are cognizant of the Title I Regulations and statutes, which at this time appear to preclude the use of Title I funds for educational

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intervention-remediation program, and that the staff be directed to follow that policy and consider the specific guidelines set down by the Court in its opinion as budgets for the ensuing years are prepared and submitted to the Board."

[17] The neighborhood character of the K-4 schools will permit increased parental involvement in every school, a concept espoused by Dr. Hugh Scott and capitalized upon by the Board's proposal to provide parental training to increase support for target children. (Exhibit 278, part 1, at D-3—D-4).

components of court-ordered desegregation plans. The plans proposed by the Board for implementation under the Court's Order will be funded fully with state and local funds. In fact, those students the Plaintiffs would wish to receive remedial services will be receiving twice the amount of such services, from the local level and from the federal level.

The Court's Order of May 20, 1980, directed the Board to plan intercultural experiences for students in those schools which, because of the Court's cost-benefit analysis, would attend predominately one race schools. Based upon the testimony of Ms. Nabors, and the voluminous exhibits presented, the Court is satisfied that the Board has met this criteria, and has used its initiative to develop intensive programs which the professional staff deem valid and educationally sound.

Dr. Hugh Scott, the Plaintiffs' expert witness, testified at length about the trend toward and the need for multicultural education directed toward the recognition of cultural diversity in a pluralistic society. The multicultural committees have developed a detailed program along the lines of Dr. Scott's suggestion. This program will eventually be offered in every school, grades K-12. (Exhibit 278, part 1, A-4). A curriculum guide for grades K-6 has already been developed and will be ready for use in those grades in 1981-1982 (Exhibit 276). Ms. Nabors testified that a similar guide for grades 7-12 is to be developed in the near future.

An intercultural exchange program is also planned pursuant to the Court's directive for those K-4 schools that will be predominately one race. These programs must, of necessity, be tailored to the individual schools and staffs involved, and these programs will be operational in the predominately one race schools under the interim plan in 1981-82.

The Plaintiffs filed only one objection with regard to the multicultural-intercultural exchange program proposed by the Board, which objection was not specific in nature. Objection

1(a) (March 25, 1981) indicates that the Plaintiffs accept the goals and objectives of the multicultural program, but insist that sufficient detail was not supplied. The testimony of Ms. Nabors and exhibits previously mentioned satisfy the Court that the validity of the planned programs has been shown and that the programs are in full compliance with the Court's directives of May 20, 1980.

The magnet school proposal presented by the Board did not satisfy the Court's desire to have at least one such alternative program[18] implemented immediately. The delay was not based upon lack of curriculum development, since plans for an academic magnet school were well under way at the time this Court approved the Board's timetable for implementation of the plan on July 15, 1980. The Board felt the program should be delayed until a suitable building for such a 7-12 grade school could become available. This problem has been obviated by the adoption of the modified interim pupil assignment plan, discussed *infra*. The Court questioned Ms. Nabors at length about the time necessary to implement the planned academic magnet school for 1981-1982 in the event a suitable building could be found. While Ms. Nabors and her committees understandable felt that more time than is available between now and the beginning of school in the fall of 1981 would be preferable for the selection of staff and students, she did testify that the task could be completed. Based on that representation, and the desire of this Court to minimize the delay in implementing as much of this plan as possible, the Court now orders that the proposed academic magnet school, to be located at the present West End Junior High School, be implemented for the coming school year, beginning with grades 7 and 8, and adding a grade each year thereafter.

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[18] The Board's plan proposed to continue the operation of Hume Fogg High School as an open zoned school with grades 9-12 for the school year 1981-1982. This proposal includes the Board's intention to re-evaluate the continuation of Hume Fogg on an annual basis. This proposal is approved.

The Plaintiffs only objection to the magnet school proposal outlined by the Board is directed toward the student selection procedure to be employed for such school. While the Board did not intend to use its selection procedure for the coming year, the Court is impressed by the mechanism developed for such selection (Exhibit 274), which includes achievement test scores, teacher ratings, and school records. These criteria will insure sufficient flexibility to provide equal access to all races, contrary to the Plaintiffs' objection. This objection is accordingly overruled.

The Black History or Afro-American Studies Program ordered by the Court in its Order of May 20, 1980, is presently in operation, having been offered in the high schools for the first time in the fall of 1980. The Court finds the curriculum guide for this course to be most adequate. (Exhibit 275). This course, along with continuing efforts to include such studies in the regular curriculum and to screen curriculum and textbooks for sensitivity to the heritage of black Americans, and the muliticultural program for all grades discussed previously, complies with this Court's directive. The Plaintiffs' objection relating to the lack of specificity and to general curriculum considerations is overruled. (Objection 1(c), March 25, 1981).

The educational considerations inherent in the move toward middle schools pursuant to the Court's directive were addressed extensively by Ms. Nabors and set forth in the exhibits. (Exhibit 278, part 1, Section E). The implementation of the middle school philosophy with its emphasis on bridging the gap between elementary and high school should go a long way toward meeting this Court's directive to concentrate on quality education and to increase community perceptions thereof.[19]

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[19] No objections were filed by the Plaintiffs relating to the educational component for middle schools.

The final educational component ordered by the Court concerns in-service training of faculty and staff members for successful implementation of the plan. No pertinent objection has been filed by the Plaintiffs to this component.[20] From the testimony and the materials presented, this component is well developed, providing a continuation of the on-going "Together We Can ... Together We Will" program previously lauded by this Court, and for new programs related to the desegregation order. (Exhibit 278, part 1, pages G-1-H-30). It is, therefore, approved as complying with the Court's Order of May 20, 1980.

In view of the foregoing discussion and findings, the educational component package as presented by the Board, with the modification regarding the academic magnet school beginning with grades 7-8 in 1981-1982, is approved as complying with this Court's Order of May 20, 1980.

II. PUPIL ASSIGNMENT COMPONENT

Two proposals were made by the Board for pupil assignment, the long range plan for implementation in 1984, and the interim plan for implementation in 1981-1982. As detailed, *infra*, the long range plan is approved as in conformity with the Court's Order of May 20, 1981; the interim plan is modified to include an expanded zone of implementation for 1981-1982.

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[20] The Plaintiffs' only objection to the administrative and staff development portion of the plan relates not to the in-service educational component, but to affirmative action plans for staff and administrative positions. While this was part of the Court's Order of May 20, 1980, the Court has reserved the personnel issue for a later date, and accordingly, no proof has been presented by the Board regarding its affirmative action plans.

A. *The Long Range Plan.*

The Board's long range proposal for elementary schools, exhibits 268 and 271, fully complies with the Court's directive to establish a system of K-4 or K-5 elementary schools of a neighborhood character, all the while maximizing opportunities for integration in a neighborhood setting. Of the 75 K-4 elementary schools proposed, Mr. Osborne estimates that approximately 31 of these schools will be walk-in schools requiring no transportation, as compared to only five at the present time. This should permit increased parental participation deemed so important by this Court and by the Plaintiffs' own expert witness, Dr. Hugh Scott.

In drawing the school zone lines for elementary schools, Mr. Osborne and his bi-racial committee committed themselves to maximizing integration as much as possible without the use of non-contiguous zones, and the results were surprising. No K-4 school is projected to be 100% black, and only five schools in the outer reaches of the County are projected to be 100% white.[21] It should be noted here that while the Plaintiffs' plan was stricken from the record, it contained a proposal to leave some of these distant outlying schools untouched by the Plaintiffs' own desegregation plan. (*See,* Plaintiffs' Exhibit Number 284 for Identification).

Approximately 20 of the elementary schools are projected to be within the 15% black or white ratio established by the Court for middle schools. Those schools which fall outside this percentage will benefit from the intercultural exchange program discussed above.

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[21] Gateway, Hickman, Joelton, Sylvan Park, and Union Hill. (Exhibit 268).

The Court is satisfied that the elementary school plan meets the Court's Order of May 20, 1980, and all the Plaintiffs' objections relating to it have no bearing on the question of compliance with the Court's mandate.[22]

The middle school plan approved by the Board contemplates the creation of 24 middle schools serving grades 5-8 in 1984. (Exhibits 268 and 269). According to the testimony of Mr. Osborne, the Board began its consideration of the middle school plan by locating suitable buildings for the unique middle school program, as outlined by the Middle School Educational Component Committee.

After the schools were selected, zones were constructed to comply with the Court's mandate to achieve at minimum a 15% representation of either race in the middle schools. Under the Board's proposal, four middle schools are not projected to fall within this 15% black/white range in 1981: Donelson (14.8% black), Apollo (14.1% black), Antioch (14.0% black), and Wright (11.7% black). These schools may well fall within the 15% range by 1984, and to require their technical compliance with the suggested ratio at this time would necessitate the rezoning of black children from neighborhood middle schools into these middle schools. In drawing the middle school zones, the Board used non-contiguous zones only where necessary, and as demonstrated by Mr. Osborne, chose the closest other race population to constitute the non-contiguous zones wherever practical.

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[22] Plaintiffs' Objection (3)(a) (February 6, 1981) and Objection 2 (March 25, 1981) attack the neighborhood character of the elementary school proposal. Again, this constitutes an attack on the Court's Order rather than an effort to achieve complance with it. Accordingly, these objections are stricken under Rule 12(f), Federal Rules of Civil Procedure, along with the Plaintiffs' elementary school plan.

Plaintiffs only objection to the Board's middle school proposal is that the burden of transportation continues to be on the black children. The middle school map (Exhibit 269), and the testimony of Mr. Osborne, demonstrate conclusively that this is not the case. In many instances, white children are required to travel to predominately black communites to attend school. For example, white children in the outer reaches of the County are required to travel to the predominately black innercity to attend Cameron; white students from the southern portion of the Pearl zone are required to travel into the innercity to Pearl; white students are required to travel into Ewing Park; and white students are required to travel into Cumberland. Merely because there may be more non-contiguous zones made up of predominately black children does not mean that these students must travel longer distances or greater lengths of time than white children, nor does it mean that these students must necessarily travel out of their neighborhoods more often than white children. The Court finds that the locations of the middle schools were chosen by a neutral process, in an effort by the Board to accommodate the unique middle school program at the best possible places, thereby looking forward to the enhancement of quality education. The amount of transportation involved for either race is necessary to reach the 15% representation level deemed desirable by the Plaintiffs' expert witness, Dr. Hugh Scott and approved by the Court in its Order of May 20, 1980.

In addition, Plaintiffs'objection regarding burden on black students at the middle school level constitutes not an objection, but an admission that the Plaintiffs' proposed plan does not comply with the Court's Order. Plaintiffs used the same middle schools in their proposed plan that the Board has used under its plan. (Exhibit 283). It is inconceivable that their objections regarding burden on black children can be alleviated by their plan because there are no additional middle schools in the black

community. When this obvious concept is coupled with the racial balance approach used by the Plaintiffs, which will require transportation of greater numbers of black children out of the black community, it is apparent that the burden on black students is increased in the Plaintiffs' plan contrary to the basic concepts of the Court's Order.

The Board's high school plan (Exhibits 267 and 268) is also in total compliance with the Court's directive of May 20, 1980. Bellevue and Joelton were closed as high schools in the school year 1980-81, with the high school population of these schools being reassigned to Hillwood and Whites Creek pursuant to the Court's directive. The long range proposal for 1984 forecasts the closure of Antioch, DuPont, Pearl, Cohn, and Goodlettsville as high schools, with their school populations being accommodated by the Goodlettsville-Madison, Pearl-Cohn, McGavock, Glencliff and Overton zones ordered by the Court.

The only deviation from the plan contemplated by the Court and the Board's new plan concerns Goodlettsville-Madison. Since the early 1970's, the Board has proposed to build a new Goodlettsville-Madison-Trinity Hills Comprehensive High School at the Hunter's Lane location. Upon reconsideration of this proposal following the Court's Order, the Board determined that it would be more economically responsible to expand the existing Madison High School to accommodate students from the Goodlettsville, Madison, Trinity Hills, and DuPont areas at a savings in excess of $2,000,000.00. (Board Minutes, Exhibit 286). The testimony of Mr. Osborne indicates that the locations make little difference to the student populations involved. If anything, the Madison location is slightly closer to the highest concentration of black students for the school population in the Trinity Hills area than was the Hunter's Lane location and the racial makeup of the school is not affected by a change in location.

The Ford Greene site chosen for the Pearl-Cohn Comprehensive High School is also approved as a central location in the proposed zone, taking into account the relative concentration of students in that zone.

It should be noted here that while the Court did not decree the racial mixture in the high schools as it did in the middle schools, all of the Board's proposed high schools, with the possible exception of Goodlettsville-Madison at 14.9% black, fall well within the 15% either race guideline established by the Court for middle schools. Furthermore, three of the 10 schools are projected to be majority black in 1984.[23]

The Plaintiffs only objections to the high school plan concern the Board's failure to consider the pairing of Maplewood and Goodlettsville in lieu of building the Goodlettsville-Madison Comprehensive High School, and its failure to use Pearl as a high school. (Objection 3(b) (February 6, 1981), and Objection 2(b) (March 25, 1981)). Both of these objections are without merit. The Maplewood objection attacks rather than follows the Court's Order of May 20, 1980, and accordingly, it should not be considered. The soundness of the Board's action in converting Pearl to a middle school is supported by the fact that the Plaintiffs' plan also uses Pearl as a middle school, rather than a high school. (Exhibit 283).

In view of this discussion, the Board's long range pupil assignment plan is approved in its entirety as in compliance with the Court's Order of May 20, 1981.

B. *The Interim Plan.*

The Board's interim plan for implementation in the fall of 1981 proposes to implement the Court's Order of May 20, 1980,

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[23] Maplewood, Pearl-Cohn, Whites Creek.

in only one area of the county—the area encompassed by the Whites Creek Comprehensive High School zone (Map, Exhibit 272, and statistical summary, Exhibit 272). Insofar as this plan goes, this portion of the interim plan is approved, including the minor deviations from the long range plan requiring the phasing in of certain zones over the next three years.[24]

In 1981, implementation of the plan in the northeastern section of the County will involve eight elementary schools serving grades K-4, three middle schools serving grades 5-8, and one comprehensive high school.

At the time this plan was filed, the Court was concerned that more of the County could not benefit from the early implemen-

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[24] As Mr. Osborne testified, the Whites Creek zone, as shown on the 1984 long range map, can be implemented in 1981, with a few minor exceptions. These exceptions relate to building capacity. Whites Creek can accommodate the Union Hill zone (now in Goodlettsville), the Brick Church zone (now in Maplewood), and the Haynes Manor area (now in Maplewood) in 1984, because of projected declines in enrollment. However, during the interim, only one grade a year from those areas can be added to Whites Creek. Therefore, beginning with the ninth grade in 1981, adding the tenth grade in 1982, and so on, the interim plan proposes to stagger the implementation of the long range plan in this area. The procedure will not only direct itself toward building capacity, it will also facilitate as little disruption of students as possible, since students who begin the ninth grade at Maplewood and Goodlettsville in 1980-1981 will be permitted to graduate from those schools.

The zones for the three middle schools, Joelton, Ewing Park, and Cumberland, will be implemented in 1981, with the exception that children in the Parkwood Estates area will continue to attend Ewing Park until 1984, when they are scheduled to attend Goodlettsville, and students from the Haynes area will continue to attend Meigs and Highland Heights until 1984, when they are scheduled to attend Ewing Park. These deviations are necessary because of capacity problems that will be alleviated in 1984 by virtue of the construction of a new high school to serve the Goodlettsville-Madison-Trinity Hills-DuPont area.

tation of the three-tiered grade structure from intervention/remediation and from the magnet school proposal until 1984. Accordingly, on March 31, 1981, the Court directed the Board to present further alternatives for increased implementation of the plan on April 6, 1981.

In directing the Board to consider other alternatives for implementation of the plan, the Court was not attacking the Board's good faith efforts in deciding not to implement the plan further. As was stated by Mr. Osborne, the rationale behind the slow implementation was that until the two new comprehensive high schools were built, any rezoning of students could be made on a temporary basis only. To avoid temporary disruption of students on this basis, the Board decided to make such changes only where permanent assignments could be made, and this could only be accomplished in the Whites Creek zone. While understanding this rationale, this Court deems the benefits to be achieved by the earlier implementation of the plan to far outweigh the minor disruptions occasioned by a stepped-up timetable.

After the Court's directive to the Board to develop an alternative proposal, the Board reported to the Court a proposal to implement the new plan insofar as possible in the southeast sector of the city in addition to the northeast sector.[25] This proposal would involve the rezoning of Cohn and Pearl High School students to Hillsboro and Hillwood for the interim period beginning 1981-1982, pending the completion of the Pearl-Cohn Comprehensive High School in 1984. This move would free Pearl and Cohn for immediate use as middle schools, pursuant to the Board's plan, and would also free West End for immediate use as an academic magnet school in 1981-1982. Elementary school zones for this interim plan have not yet been

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[25] This proposal was attached to the interim plan map in the form of an overlay on Exhibit 272 and is described on Exhibit 279.

finalized, and some flexibility will be necessary, especially on the outer fringes of the southeast sector. This Court is assured that this planning can be completed well in advance of the approaching school year, and that the appropriate educational components can be in place for this sector just as they will be in place in the northeastern sector. Accordingly, the revised interim plan is approved.

It should be noted here that to complete the plan in the remaining sections of the County will require the construction of the Goodlettsville-Madison Comprehensive High School and a sufficient decline in enrollments at Glencliff, McGavock, and Overton, thus permitting the reassigning of students from Antioch High School and Dupont pursuant to the Court's directive. Accordingly, pending such events, attendance patterns in this section of the County should remain as they are.

ADDITIONAL MATTERS

After many days of testimony in this cause, it has become apparent to this Court that the rigid guidelines placed upon the school system by this Court's Order in 1971 have become obsolete and no longer necessary. The good faith efforts of this Board to achieve desegregation have been amply demonstrated by all the plans submitted to this Court. This Court does not deem it necessary to impose further rigid guidelines upon the Board in terms of minor alterations in zone lines where deemed advisable to achieve better integration or to conform to building capacities. In addition, in view of the new plan now approved, the restriction placed upon building in the outlying areas by the 1971 Order no longer has validity, since the new plan addresses desegregation and quality education on a county-wide basis. Accordingly, the ban on such construction, where deemed necessary by the Board to improve facilities, accommodate students, or enhance integration, should be lifted.

An appropriate Order will enter. This is a final order from which an appeal as of right is provided by Rules 3 and 4, Fed. Rules App.Proc. Because efforts at implementation for the school year 1981-82 are immediately imperative, this Court will not grant a stay of this order pending any appeal.

APPENDIX E

No. 81-5370
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Robert W. Kelley, et al.; Henry C. Maxwell, Jr., et al,
Plaintiffs-Appellants,

vs.

Metropolitan County Board of Education of Nashville and Davidson County, Tennessee,
Defendants-Appellees.

ORDER

Before: EDWARDS, Chief Circuit Judge, JONES, Circuit Judge, and CELEBREZZE, Senior Circuit Judge.

On receipt and consideration of a motion for stay filed by Robert W. Kelley, et al., plaintiffs-appellants; and

On consideration of said motion under terms of Rule 8 of the Rules of Appellate Procedure and pertinent case law, *Virginia Petroleum Job. Ass'n* v. *Federal Power Com'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also North Avondale Neighborhood Ass'n* v. *Cincinnati Metropolitan Housing Authority*, 464 F.2d 486, 488 (6th Cir. 1972); and

Further noting that generally four factors are required for the issuance of a stay, as follows:

1. Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?

2. Has the petitioner shown that without such relief, it will be irreparably injured?

3. Would the issuance of a stay substantially harm other parties interested in the proceedings?

4. Where lies the public interest?

Observing from this record that affirmative answers favorable to plaintiffs' motion must be given in relation to the first two of these questions, while a negative answer appears appropriate to the third;

And concluding as to the fourth question that where (as here) after many years a final school desegregation order has been entered in the District Court, appealed to this court and affirmed, and then appellants' petition for certiorari has been denied in the Supreme Court, it is in the public interest for a proposed departure from said order to be reviewed by the Court of Appeals prior to, rather than after, the institution of the change sought;

Now, therefore, plaintiffs' motion for stay is hereby granted, the mandate is ordered issued forthwith, and the appeal is expedited for hearing in the October term of this court.

Entered by order of the Court

/s/ JOHN P. HEHMAN
Clerk

APPENDIX F

Supreme Court of the United States
Washginton, D. C. 20543

Chambers of
Justice John Paul Stevens

August 20, 1981

IN CHAMBERS MEMORANDUM OF JUSTICE STEVENS

Re: No. A-144 Metropolitan County Board of Education, et al., v. Kelley, et al.

Pursuant to the rules of this Court, the motion of the Metropolitan Nashville Board of Education to vacate the stay entered by the United States Court of Appeals for the Sixth Circuit on August 19, 1981, has been referred to me for decision. The movants have persuaded me that I have jurisdiction to vacate the stay entered by the Court of Appeals, but for the following reasons I have decided not to do so.

The district court order of April 17, 1981, that has been stayed by the Court of Appeals substantially modifies the desegregation order that had previously been in effect in Davidson County, Tennessee. The plaintiffs filed an appeal from that order and, after hearing oral argument in connection with the plaintiffs' application for a stay, the Court of Appeals expressed the opinion that the changes in the prior order are of sufficient significance that they should be reviewed by an appellate court before they are implemented. I share that opinion.

Although, as the Board of Education has pointed out, the stay will cause significant expense and inconvenience to the community, because the interim order will affect 21 elementary

schools, six middle schools and three high schools immediately, and also will have an impact on the permanent plan scheduled to go into effect in 1984, it seems to me that even greater inconvenience might result if the plan were to go into effect forthwith and be modified or set aside at a later date when the Court of Appeals reviews its merits. The Court of Appeals has greater familiarity with the case than it is possible for me to have in the brief time I have had to examine the papers that have been filed with me; for the purpose of my action I accept the correctness of that court's determination that there is a likelihood that plaintiffs will prevail on their appeal. If that be so, it seems to me that in the long run there will be less inconvenience and hardship to all parties if appellate review is had prior to the implementation of the interim order of the district court. Accordingly, the motion of the Board of Education to vacate the stay is denied.

APPENDIX G

MEMORANDUM OPINION

(Filed June 28, 1971)

History of Litigation

The original action seeking school desegregation of the Nashville school system was filed in September, 1955.[1] Finally, on July 16, 1970, after the gradual evolvement of the present status of the law, this United States District Court, speaking through the Honorable William E. Miller, held that the local school board had not met its affirmative duty to abolish the dual school system in three categories: pupil integration, faculty integration, and site selection for school construction. *Kelley* v. *Metropolitan County Board of Education,* 317 F. Supp. 980 (M.D. Tenn. 1970). The approval and implementation of a plan to correct the adjudicated wrongs was delayed until the Sixth Circuit Court of Appeals ordered immediate hearings for that purpose.

Background Data

The Metropolitan school system consists of three divisions. The elementary schools accommodate students from kindergarten through the sixth grade. Junior high accommodates grades seven through nine. Senior high consists of grades nine through twelve.

In the 1970-71 school year a total of 94,170 students attended the Metropolitan schools. Of this number, 33,485 were transported by the Metropolitan school system. Of the total transported, less than 4,000 were black and approximately 30,000 were white.

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[1] Reference to the separate and later consolidated actions regarding the City of Nashville and Davidson County systems is omitted for brevity.

One hundred forty-one schools were operated in the Metropolitan school system during the 1970-71 school year. The racial breakdown of the students was:

black	23,533
white	71,754
other	237

The percentage breakdown was:

black	24.63%
white	75.12%
other	.25%

Plans Submitted for Court Approval

School Board Plan

The Board of Education submitted a plan for pupil integration in August, 1970. Included in this plan was a policy statement that the school board "accepts as an ideal student racial ratio of an integrated school as one which is 15% to 35% black."[2]

The August, 1970 plan made 49 minor geographic zone changes, and provided for the transportation of an additional 1162 pupils.[3] The result of the plan was to leave the elementary schools significantly unchanged. Six of the 38 high schools and junior high schools would remain at least 50 per cent black. Fifty-seven per cent of the black high school and junior high

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[2] The testimony of expert witnesses indicates that the accepted and satisfactory norm is a range from 10 per cent below to 10 per cent above the percentage of black students enrolled in a school system.

[3] McGavock, a recently erected high school, was not included in the August, 1970 plan.

school students would attend these six schools. The racial composition of two schools would be at least 95 per cent black and four other schools would be at least 90 per cent black. This would result in 47 per cent of the black students attending schools where the composition would be above 90 per cent black. Eight schools, accommodating 20 per cent of the black students, would operate with 15-35 per cent black students. Fifteen schools would operate with 95 per cent or above white students.

On the last day of the hearings, which were held on several days over a three-month period, the school board submitted an amendment providing for the selection of students for McGavock School by paring.

Plaintiffs' Plan

Elementary Schools. Plaintiffs, through clustering and pairing, using both contiguous and non-contiguous zoning, proposed to effect in most elementary schools, through two alternate plans, a mathematical ratio in the range of 15-35 per cent black. Plan I would require the transportation of 25,500 elementary students, and Plan II would require the transportation of 27,000 pupils. Eighty-two of 100 schools would fall within the ideal ratio under Plan I, while under Plan II, 91 schools would attain the indicated ratio.

Secondary Schools. A model was submitted which included sectoring, clustering and pairing to attempt to attain 15-35 per cent black in the junior and senior high schools. In both the elementary and secondary school plans there is not a satisfactory description of grade organization, structuring of the schools, the assigment of the pupils, or definite zone description. The plans propose the mathematical result indicated, but delegate to the school board the actual assignment of pupils and implementation of the plan.

HEW Plan A as Amended[4]

At the request of the Court, the Department of Health, Education and Welfare submitted a plan with two alternates. The principal plan was designated as Plan A. This plan incorporates geographic zone changes, clustering, pairing (both contiguous and non-contiguous), and grade restructuring.

Elementary Schools. Five schools would be closed.[5] Seventy-four schools would have a racial percentage of 16-41 per cent black. Twenty-two schools which are located in the far reaches of the county would have a racial percentage of 0-11 per cent black. Three of those 22 would have no blacks. Under Plan A there would be no elementary school in the system with a black student enrollment of more than 41 per cent. Fifty-nine per cent of the black students in the system would attend schools with a black student enrollment of between 35 and 41 per cent. Three per cent of the black students in the system would attend schools with a black student enrollment of less than 15 per cent. Twenty-four per cent of the total number of white students in the system would attend schools in which black enrollment is less than 5 per cent. One per cent of the total black student enrollment in 16 schools, or 125 students, would be enrolled in schools with less than 5 per cent black student enrollment.

Under this plan, approximately 22,000 elementary school students would be eligible for school-provided transportation. This is approximately 10,500 more than the Board transported

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[4] Adjustments were made to shorten transportation routes, to incorporate the school board plan for McGavock School, to adjust the student makeup of Pearl High School.

[5] Three of the five schools to be closed are rated unsatisfactory by the consultants hired by the school board. The other two are listed as inadequate.

in 1970-71, and 9,700 more than those who would be transported under the Board's proposed plan. Three thousand five hundred fewer students would be transported under HEW Plan A than under the plaintiffs' Plan I, and some 5,000 fewer than would be transported under plaintiffs' Plan II.

Junior High Schools. This plan incorporates the school board amendment to the August, 1970 plan. Eighteen of 25 schools would have a racial composition of 20-40 per cent black. Seven schools would have a composition ranging from 0-5 per cent black. These seven schools are in the outer reaches of the county. Some former senior high schools would be changed to junior high schools. Two high schools would be closed.

Senior High Schools. This plan incorporates the school board amendment to the August, 1970 plan. Central High School would be closed. MaGavock High School is to be opened. Of the 18 schools, 11 would have 18-44 per cent black. One would have an 11 per cent enrollment of blacks and six would be virtually all white. These all-white schools are located in the outer reaches of the county.

An analysis of the HEW amended plan with regard to the secondary schools reflects that:

(1) no school would operate with more than 44 per cent black;

(2) 29 of the 43 schools would operate within the range of 15-44 per cent black, with one additional school having 11 per cent black;

(3) 13 schools, primarily in the outer reaches of the county, would have 95 per cent or more white;

(4) 67 per cent of the schools, housing 90 per cent of the black students, would operate in the 15-44 per cent black range;

(5) transportation would be required for 26,673 junior and senior high school students; and

(6) including the transportation necessary for McGavock School, 2,838 more secondary pupils would require transportation than were transported in the 1970-71 school year.

Objective, Test, and Methods

Objective

> "The objective today remains to eliminate from public schools all vestiges of state-imposed segregation." *Swann* v. *Charlotte-Mecklenburg Board of Education*, ... U.S. ..., 28 L.Ed.2d 554, 566 (April 20, 1971).

The Supreme Court has stated that "[t]he objective is to dismantle the dual school system," *Swann, supra,* at 573, ". . . to eliminate invidious racial distinctions," *Swann, supra,* at 568, and ". . . to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *Board of School Commissioners*, ... U.S. ..., 28 L.Ed.2d 577, 581 (April 20, 1971).

Test

A plan "that promises realistically to work, and promises realistically to work *now*" is required. *Davis, supra,* at 581, quoting *Green* v. *County School Board,* 391 U.S. 430 (1968). A plan "is to be judged by its effectiveness." *Swann, supra,* at 572; *Davis, supra,* at 581. A plan "is not acceptable simply because it appears to be neutral." *Swann, supra,* at 573.

Methods to Accomplish Objective

The following methods have been acknowledged by the United States Supreme Court: (1) restructuring of attendance zones, both contiguous and non-contiguous; (2) restructuring of schools; (3) transportation; (4) sectoring; (5) non-discriminatory assignment of pupils; (6) majority to minority transfer; and (7) clustering, grouping and pairing. *Swann, supra; Davis, supra.*

Discussion of Plans Submitted

The pupil integration plan submitted by the school board, viewed in the most favorable light, constitutes mere tinkering with attendance zones, and represents only a token effort. It clearly falls short of meeting the objectives and tests set out in the decisions of the United States Supreme Court. *Swann* v. *Charlotte-Mecklenburg Board of Education, supra; Davis* v. *Board of School Commissioners, supra; Green* v. *County School Board,* 391 U.S. 430 (1968). In effect, the defendant has made no effort to meet its affirmative duty to establish a unitary school system "in which racial discrimination would be eliminated root and branch."[6] *Green* v. *County School Board, supra,* at 437-38; quoted in *McDaniel* v. *Barresi,* ... U.S. ..., 28 L.Ed.2d 582, 585 (April 20, 1971).

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[6] Based on defendants' school statistics for 1969-70, the student enrollment was 95,789. The total majority to minority rezoned under this plan is:

Elementary		
whites gained in black schools	301	
blacks gained in white schools	457	
	758	majority to minority transfer in elementary
Junior High		
whites gained in black schools	430	
blacks gained in white schools	400	
	830	majority to minority transfer in junior high
Senior High		
whites gained in black schools	73	
blacks gained in white schools	735	
	808	majority to minority transfer in senior high

Since the defendants have, in effect, failed to submit a constitutionally sufficient plan, the Court must examine the other plans. The plaintiffs' plans as to elementary schools are adequate in one respect. Under Plan I, 82 out of 100 schools would be within the indicated range of 15-35 per cent black, which was set by the school board. Plan II would satisfy this standard in 91 out of 100 schools. This plan, however, has two features which are objectionable to the Court. The first is that actual assignment of students, i.e., the locations from which they come, is left to the school board. The historical reluctance by the school board to solve this problem instills a lack of confidence in their implementation of this aspect without close supervision. The second objection is that some schools in the outer reaches of the county are included. The Court finds that costs and other problems incident to transportation make this feature of plaintiffs' plan impractical and not feasible.

Each and every school is not required to be integrated. The test is a unitary school system. *Swann, supra.* The practicality and feasibility of a plan is a material consideration. *Swann, supra.*

The cost of the transportation of students and the unnecessary disruption of the students are proper considerations. The Court finds that distance and transportation difficulties make the integration of these schools highly impractical.

Plaintiffs' plan for the desegregation of secondary schools, as in their elementary plan, was a model using sectoring, zoning (contiguous and non-contiguous), and pairing to accomplish the indicated racial balance. In neither the elementary plan nor the secondary model is there a description of grade organization, structuring of the schools, the assignment of pupils, or proper description of zoning. For the reasons set forth as to the elementary school programs, the secondary school plan of the plaintiffs is rejected.

The plans of the plaintiffs and defendants being rejected for the reasons stated, the HEW plan is the only realistic plan remaining before the Court. As a result of the evidence produced at the hearing, the HEW plan was amended to effect the following changes:

(1) adjustment of the black percentage at North High School from 65 per cent black to 44 per cent black, and the reduction at Pearl High School to 33 per cent black, with corresponding adjustments in Stratford, Maplewood, and other schools;

(2) shortening the time of transportation of certain pupils; and

(3) incorporation of the McGavock High School phase of the defendants' amended plan.

On the last day of the hearings, the defendants presented an amendment to its August, 1970 plan. This amendment provided that McGavock would be a comprehensive high school serving an area where several junior high schools are located. Although this amendment applied only to a small sector of the secondary school system, it reflected the beginning of an awareness by the defendants of their affirmative constitutional responsibility. The defendants indicate a desire to make similar proposals in the future, which desire the Court wishes to encourage. If the Board of Education had genuinely wished to establish a unitary school system, it had available to it the superior resources and assistance to do so.

The realistic and effective approach of the defendants to the McGavock School area was incorporated as an amendment to the HEW plan, despite the fact that it requires more transportation, over longer distances, than was required by the original HEW plan. The Court feels that where administrative goals can be satisfied without hampering the constitutional objectives to be accomplished, such goals should control.

Action of the Court

The Court hereby adopts the HEW Plan A as to elementary schools. This plan utilizes all of the methods previously enumerated. The map showing the georgraphic zones is on file with the clerk. This map also reflects the zoning, pairing and clustering to be employed. The charts appearing at pages 34 through 41 of the HEW plan, as filed with the clerk, are adopted as a part of said plan and will be followed in the implementation thereof.

Simultaneously with this Memorandum Opinion, the Court has filed maps showing the geographic zones of the junior and senior high schools. Likewise, charts are filed titled Table 1, Senior High Schools, and Table 2, Junior High Schools. These charts will be followed in the implementation of the plan.

In the implementation of the plans, the transparent maps can be placed as overlays on the student locator map. Thus the georgraphic boundaries of the zones become clear. In effect, the Court is providing the defendant school board a map overlay for each of the grade divisions, namely the elementary schools, the junior high schools, and the senior high schools. These overlays indicate grade and school groupings, where such are made, and approximate areas for attendance. Accompanying tables show the approximate numbers of pupils involved. The responsibility for determining the precise boundary lines is placed upon the defendant Board of Education. A written description of such boundaries, together with tables showing approximate numbers of pupils by race in each school, shall be filed with this Court by August 1, 1971. The defendant Board of Education may make minor alterations in boundaries provided such alterations do not lessen the degree of desegregation in the plan ordered by the Court.

The Court is aware that the cost of implementing any plan is a major concern. Much proof was introduced as to the financial

impact of any plan which requires transportation. Since the defendants have consistently transported large numbers of students to promote segregation, some adjustment must be made to reverse this unconstitutional practice. Practical solutions are available, such as the multiple use of buses, staggered hours for school opening, and staggered hours for individual grades.

> "We do not read *Swann* and *Davis* as requiring the District Court to order the Board to provide extensive transportation of pupils to schools all over the city, regardless of distances involved, in order to establish a fixed ratio in each school." *Northcross* v. *Board of Education,* Civil Nos. 20,533, 20,539 (6th Cir., filed June 7, 1971).

This order does not contemplate cross-transportation of pupils within a grade level in implementation of this order. If such crossing occurs, the Board may make minor adjustments in zones or may make application to the Court for reconsideration of the zones. It is further contemplated that the transportation routes in the plan implemented by this order permit uninterrupted transportation of children from home pickup points to and from the school attended. This is not to preclude the Board in the exercise of administrative discretion and consideration of transportation economics, from establishing transfer routing and collection points.

The Court is aware that some "all-white" schools remain in the outlying areas of the county. However, based upon practical considerations, common sense and judgment dictate that they should not be integrated. Integration of those particular schools would not be feasible, both from a distance and a cost standpoint. However, to prevent the use of these schools as an avenue of resegregation, certain restrictions on their use will be hereinafter set forth.

Special Provisions

Majority to Minority Transfer Policy

After this plan is implemented, there will be no schools which have a majority of black students. Because of population changes or other circumstances, however, this situation might occur in the future. Therefore, the following policy shall be a part of the plan to be implemented.

Whenever there shall exist schools containing a majority of black students, this school board shall permit a student (black or white) attending a school in which race is the majority to choose to attend the closest school where his race is a minority. The Board of Education will provide all such transferring students free transportation and will make space available in the school to which he desires to move. The Board will notify all students of the availability of such transfers.

Faculty Integration

On July 16, 1970, Judge Miller in this case stated:

> "It is well recognized that faculty and staff integration is 'an important aspect of the basic task of achieving a public school system wholly free from racial discrimination.' United States v. Montgomery County Board of Education, 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969); *see* Bradley v. School Board of City of Richmond, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (1965). In order to implement this mandate, the Court concludes that in the instant case faculties must be fully integrated so that the ratio of black and white faculty members of each school shall be approximately the same as the ratio of black to white teachers in the system as a whole. Robinson v. Shelby County Board of Education, *supra;* Nesbit v. Statesville City Board of Education, 418 F.2d 1040 (4th

Cir. 1969); Stanley v. Darlington County School District and Whittenberg v. Greenville County School District, 424 F.2d 195 (4th Cir. 1970); Pate v. Dade County School Board, 307 F. Supp. 1288 (S.D. Fla. 1969); *contra,* Deal v. Cincinnati Board of Education, *supra. But see* Goss v. Board of Education of the City of Knoxville, 406 F.2d 1183 (6th Cir. 1969)." *Kelley* v. *Metropolitan County Board of Education, supra,* at 991.

* * * * * * * *

"It is the conclusion of the Court that the present policy of faculty desegregation applied by defendant is constitutionally inadequate. That policy must be altered to comply with the standards set forth above. A similar policy also must be applied to all other personnel employed by defendant school board." *Kelley* v. *Metropolitan County Board of Education, supra,* at 992.

The court-required ratio for teachers in each school was fixed at that time to be 80 per cent white to 20 per cent black. Approximately 94 schools are not currently operating at this ratio. In most schools, this ratio could be accomplished by moving one or two teachers. Upon the implementation of the plan presently adopted by the Court, there should be no difficulty in meeting the court order of 1970. Therefore, the defendants are required to effect said ratios for the next school year beginning on or about September 1, 1971.

The school board shall immediately announce and implement the following policies:

1. The principals, teachers, teacher-aides, and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for black students or white students. The school board shall, to the extent

necessary to carry out this desegregation plan, direct members of its staff to accept new assignments as a condition to continued employment.

2. Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.

3. If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school system which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the school system. In addition, if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Prior to such a reduction, the school board will develop or require the development of nonracial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school board. The school board also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.

"Demotion" as used above includes any reassignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held

previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for which he has had substantial experience within a reasonably current period. In general, depending upon the subject matter involved, five years is such a reasonable period.

Construction, Renovation and Location of Schools

On July 16, 1970, the United States District Court stated:

"The constitutional requirement of desegregation also finds application in the area of construction, renovation, and location of schools. School boards are required consciously to plan school construction and site location so as to prevent the reinforcement or recurrence of a dual educational system. *See, e.g.*, Felder v. Harnett County Board of Education, 409 F.2d 1070 (4th Cir. 1969); Swann v. Charlotte-Mecklenburg Board of Education, 306 F. Supp. 1291, 1299 (W.D. N.C. 1969); Pate v. Dade County School Board, 307 F. Supp. 1288 (S.D. Fla. 1969). Courts may properly restrain construction and other changes in the location or capacity of school properties until a showing is made that such changes will promote rather than frustrate the establishment of a unitary school system. This Court in the past has stated that school boards may be enjoined from planning, locating or constructing new schools or additions to existing schools in such manner as to conform to racial residential patterns or to encourage or support the growth of racial segregation in residential patterns. Such operations, rather, are to be conducted 'in such manner as to affirmatively promote and provide for both the present and future an equitable distribution of racial elements in the population of each School System.' Sloan v. Tenth School District of Wilson County, Civ. No. 3107 (M.D. Tenn., Oct. 16, 1969).

"Looking to the facts of the instant case, it becomes apparent that defendant's decisions on the site selection and construction of its newest schools were not designed to promote desegregation. Since 1963, defendant has built four new elementary schools (Dodson, Granberry, Lake View, and Paragon Mills), eight new junior high schools (Apollo, Bass, Ewing Park, McMurray, John T. Moore, Neely's Bend, Rose Park, and Wright) and one new high school (Dupont). Of these 13 schools, Rose Park, with an enrollment of 527 black students and 11 white students, is virtually all-Negro. The remaining twelve schools, however, are, on the average, 97% white, with none having a black enrollment as high as 10%. Three elementary schools (Cora Howe, Fall-Hamilton, and H. G. Hill) and one high school (McGavock) are currently under construction. Enrollment estimates indicate that all of these schools will be predominately white.

"Seven elementary schools, two high schools, and one school for the physically handicapped are currently in the planning stage. The two high schools are being planned for predominantly black residential areas, thereby assuring predominantly black student bodies. Five of the seven elementary schools are to be constructed in virtually all-white residential areas, while the remaining two are projected for location in all-black or predominantly black residential areas. Thus, from the foregoing, it is apparent to the Court that defendant must consider making substantial alterations in its school construction policies in order to comply with constitutional requirements.

"The Court is of the opinion that the following course of action must be taken by defendant. First, those new schools on which construction work was actually in pro-

> gress as of November 6, 1969,[13] may be completed. Though this action may not produce an ideal result in light of the goal of integration, it will prevent unnecessary economic waste. Also, since, these new schools will be subject to the same zoning policies prescribed above, their segregative influences should be lessened. Second, in instances where actual construction had not begun as of November 6, 1969, defendant must revise its plans where necessary in relation to these proposed schools so as to find a location that will maximize student integration. Finally, in the future all construction plans as well as plans for closure of old schools must be governed by the principles stated herein. The purpose of the Court in making such a requirement is to insure that such plans will serve the purpose of establishing a unitary school system. *See* Sloan v. Tenth School District of Wilson County, *supra.*" (Footnote omitted.) *Kelley, supra,* at 992-93.

New Construction. The Board has proposed for approval the erection of two comprehensive senior high schools, one in the Joelton school area, and the other in the Goodlettsville area.

In connection with future planning, the Board employed a team of consultants to evaluate the existing school structures and to project the location of new structures. Prior to the submission of these recommendations, the Court requested, and two administrators of the Board located on a map, the ideal locations for comprehensive schools. When the team of consultants later made its report, their projections generally agreed with those of the school administrators. They found that new comprehensive schools should be located in the general area of

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[13] This is the date of the Temporary Restraining Order issued by this Court to enjoin defendant from further construction, expansion, or closure of schools pending the outcome of this suit."

the proposed inner-city expressway loop known generally as "Briley Parkway." The reason for this agreement is obvious when the pupil locator map is examined. Briley Parkway is generally the divider between the inner-city pupils and the outer-county pupils. It is roughly the half-way division. By the establishment of schools in this area, the integration of schools would be effected naturally and thereby minimize transportation.

Therefore, the Court finds that the erection of a comprehensive school in the Joelton area, with geographic zones drawn in accordance with the testimony in court, will maximize student integration. Upon submission of proper zoning and pupil assignment, this construction will be approved.

The proposed Goodlettsville school, a comprehensive high school, is located in an all-white community and is not located near the dividing line between inner-city population and outer-county population. By referring to the pupil locator map, it clearly appears that the erection of this school would tend to promote segregation. Thus the erection of this school in its proposed location is hereby enjoined. If the Board desires to establish another comprehensive high school, subsequent court approval may be obtained by submitting an appropriate location and proper geographic zones, which will achieve and perpetuate integration.

Another proposal is the erection of a school for the physically handicapped at 2500 Fairfax Avenue. This facility is to be erected near Vanderbilt University. The availability of professional services from Vanderbilt University and Vanderbilt Hospital is stressed. The plaintiffs assert that said project should be located in a "halfway" position between Vanderbilt University, MeHarry Medical College, and Fisk University.

The Court feels that the facility will have little, if any, effect on achieving a unitary school system. This Court will not

substitute its judgment for that of the Board, and the Board's proposal is approved.

Additions and Renovations. An application has been made for permission to acquire additional property for Hillsboro School so as to transform Hillsboro into a comprehensive high school. This application is denied for the same reasons that the Goodlettsville school was not approved.

Protable classrooms, referred to generally as "portables," have been used by the Board to house students in schools which were all-white or had received only token integration when there were vacant rooms in predominantly black schools. In effect, portables have been used to maintain segregation. In the future, portables shall be used only to achieve integration and the Board is hereby so enjoined.

In the plan adopted by the Court, certain schools in the outlying areas of the school district remain virtually all white. By reason of the past conduct of the Board the Court hereby sets forth the following restrictions to prevent these schools from becoming vehicles of resegregation. It is ordered that the schools, which have less than 15 per cent black pupils after the implementation of the plan, shall not be enlarged either by construction or by portables, and shall not be renovated without prior court approval. Furthermore, no additional schools shall be erected without prior court approval.

By making the above restrictions, this Court does not imply that it will make "year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." *Swann, supra,* at 575.

The parties will draw and submit an order to the Court within fifteen (15) days. However, without said order this Memorandum Opinion is self-executing and must be implemented for the school year beginning on or about September 1, 1971. The Court will retain jurisdiction of this case. No stay will be granted by this Court. *Swann, supra,* at 570; *United States* v. *Board of Public Instruction,* 395 F.2d 66 (5th Cir. 1968); *Brewer* v. *School Board,* 397 F.2d 37 (4th Cir. 1968).

L. CLURE MORTON
United States District Judge

APPENDIX H

Robert W. Kelley et al., Henry C. Maxwell, Jr., et al.,
Plaintiffs-Appellees-Cross-Appellants,

v.

Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, C. R. Dorrier, Chairman, et al.,
Defendants-Appellants-Cross-Appellees.
Nos. 71—1778, 71—1779.

United States Court of Appeals,
Sixth Circuit.
May 30, 1972.

On remand from the Court of Appeals, 436 F.2d 856, the United States District Court for the Middle District of Tennessee, Nashville Division, L. Clure Morton, J., adopted a school desegregation plan and appeal was taken. The Court of Appeals, Edwards, Circuit Judge, held that the district judge's choice of the Department of Health, Education and Welfare plan, which clearly appeared to be a plan for ending dual system in metropolitan school district based on race and substituting therefor a unitary one was within the court's judicial discretion; that where school system has been deliberately segregated the board must do more than establish rules which are fair on their face but serve to perpetuate effects of segregation; that record supported finding that racial discrimination in school district continued until close of record if not beyond; that population shifts did not eliminate duty of board to present plan for unitary system; and that it was appropriate to take notice of proportion of black and white students within area and to seek as practical plan for ending white and black schools and substituting schools representative of area in which students live.

Affirmed.

McCree, Circuit Judge, filed a concurring opinion.

1. Federal Civil Procedure (key) 161

Defendants in protracted school desegregation case waived issue of alleged failure to comply with class action rule because of changes in status of original party plaintiffs since commencement of the suits by failing to raise issue prior to trial and final adjudication of case. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

2. Schools and School Districts (key) 13

Class action to require school desegregation dealt with continuing constitutional violations and did not become moot because years of delay, much of it attributable to the defendants, resulted in the graduation of the named, original student plaintiffs from the school system before final decision.

3. Schools and School Districts (key) 13

Where school system has been deliberately constructed on a segregated basis by state action, a duty inheres in school board to do more than to establish rules which are fair on their face but which simply serve to perpetuate effects of such segregation.

4. Schools and School Districts (key) 71, 72, 141(1), 154

Record in desegregation case supported finding of district judge that racial discrimination in school construction, assignment of temporary buildings, assignment of teachers, and assignment of students continued until close of record if not beyond, and that there was a background of racial discrimination by means of state law which motivated much of the school segregation.

5. Schools and School Districts (key) 13

Existence of population shifts in metropolitan district which helped to some degree to change racial composition of some schools during course of school desegregation case did not eliminate duty of school board to present plan for unitary school system and did not alter duty of district court, on default of school board to require production of a plan and order it into effect.

6. Schools and School Districts (key) 13

In devising plans to terminate residual effects of school segregation it is appropriate for the school system and district judge to take notice of proportion of black and white students within the area and to seek as practical a plan as may be for ending white schools and black schools and substituting therefore schools which are representative of the area in which the students live.

7. Schools and School Districts (key) 13

Earlier finding of good faith does nothinbg to excuse defaults and failures of school board to devise plan for school desegregation which is effective.

8. Appeal and Error (key) 170(1)

Where no motion was filed in school desegregation case for relief pertaining to claims of practical busing problems supposedly arising after desegregation order was filed in the district court, and in the Court of Appeals the statements of problems constituted allegations which were controverted by the plaintiffs, until the claims were presented in trial court with an opportunity for sworn testimony to be taken and facts decided by process of adversary hearing Court of Appeals had no jurisdiction over such issues.

9. Courts (key) 405(15)

While during pendency of appeal jurisdiction of case lies in the appellate court, if an unexpected problem arises concerning actual terms of order or judgment under appeal, district court may upon being apprised of problem and having determined its substantiality with or without a hearing certify to appellate court the desirability of remand for completion or augmentation of appellate record.

10. Courts (key) 259
Municipal Corporations (key) 57

Neither metropolitan city council nor the state legislature could forbid the implementation of court mandate based upon United States Constitution.

11. Injunction (key) 210

Injunctive decree in school segregation case is always subject to modification on basis of changed circumstances.

12. Schools and School Districts (key) 13

District judge's choice of Department of Health, Education and Welfare plan, which clearly appeared to be a plan for ending a dual school system in metropolitan school district based on race and substituting therefor a unitary one which included the transportation of black students of grades one to four to outlying schools and the cross transportation of whites of grades five and six was within judicial discretion.

APPENDIX B

13. Federal Civil Procedure (key) 181

Once class action in school desegregation case had been adjudicated and action of trial court had been reviewed by Court of Appeals it was neither necessary nor proper to continue to redetermine standing of plaintiffs to represent class. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

Avon N. Williams, Jr., Nashville, Tenn. (Jack Greenberg, James M. Nabrit, III, Norman J. Chachkin, Sylvia Drew, New York City, on the brief), for plaintiffs as appellees and cross-appellants.

Dick L. Lansden, Nashville, Tenn. (Harlan Dodson, Jr., Hamilton Gayden, Jr., Nashville, Tenn., on the brief), for defendants as appellants and cross-appellees.

K. William O'Connor, Civil Rights Div., Washington, D. C., for United States, amicus curiae.

Before EDWARDS, CELEBREZZE and McCREE, Circuit Judges.

EDWARDS, Circuit Judge.

In this case we do not write on a clean slate. What follows describes an incredibly lengthy record and settled law pertaining to segregated schools. We start with this latter, as recited in the United States Constitution and in three historic, unanimous decisions of the United States Supreme Court—the last dated 1971.

> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S.Const. Amed. XIV, § 1.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. Brown v. Board of Education, 347 U.S. 483, 495, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

[A] plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," Griffin v. County School Board, 377 U.S. 218, 234, 84 S.Ct. 1226, 12 L.Ed.2d 256; "the context in which we must interpret and apply this language (of *Brown II*] to plans for desegregation has been significantly altered." Goss v. Board of Education, 373 U.S. 683, 689, 83 S.Ct. 1405, 10 L. Ed.2d 632. See Calhoun v. Latimer, 377 U.S. 263, 84 S.Ct. 1235, 12 L.Ed. 2d 288. The burden on a school board today is to come forward with a plan that promises realistically to work *now*. Green v. County School Board of Kent County, 391 U.S. 430, 438-439, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school

systems. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

After 17 years of continuous litigation the Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, appeals from a final order of the United States District Court for the Middle District of Tennessee requiring the School Board to take the necessary steps to end the racially separated school systems which it had previously been found to be operating. This order was a direct result of an order of this court approving the District Court's findings of violations of equal protection and vacating a stay of proceedings. In it we had noted:

> [T]he instant case is growing hoary with age. It is actually a consolidation of two cases. The first case, Kelley v. Board of Education of the City of Nashville, Civ.A. No. 2094, was filed in September of 1955; and the second case, Maxwell v. County Board of Education of Davidson County, Civ.A. No. 2956, was filed in September of 1960. A whole generation of school children has gone through the complete school system of Metropolitan Nashville in the intervening years under circumstances now determined to have been violative of their constitutional rights. A second generation of school children is now attending school under similar circumstances—and the remedy is not in sight. Kelley v. Metropolitan County Board of Education of Nashville, Tennessee, 436 F.2d 856, 858 (6th Cir. 1970).

The order of the District Judge is the first comprehensive and potentially effective desegregation order ever entered in this litigation. The District Judge tells us that now the remedy is at least in sight.

THE APPELLATE ISSUES

On appeal defendants contend 1) that the District Court had no jurisdiction to hear and determine this case because of failure to comply with Rule 23 of the Federal Rules of Civil Procedure and because of changes in the status of the original party plaintiffs since the commencement of these suits; 2) that the District Court's order is invalid because it requires integration of schools according to a fixed racial ratio, in violation of the rules set out in Swann v. Charlotte-Mecklenburg Board of Education, *supra*, 402 U.S. at 23, 24, 91 S.Ct. 1267, 28 L.Ed.2d 554 and 3) that the plan ordered into effect should be reconsidered because of what the defendant School Board claims to be adverse effects on the health and safety of school children involved.

Plaintiffs as cross-appellants claim 1) that the District Court erred in adopting the Department of Health, Education and Welfare plan when the plan proposed by plaintiffs would have achieved a greater degree of integration; and 2) that the HEW plan should have been rejected because it places the burden of desegregation disproportionately upon Negro children.

HISTORY OF THE NASHVILLE—DAVIDSON COUNTY CASE

The history of school desegregation from Brown v. Board of Education, *supra*, to date can be traced in this case in the proceedings in the District Court, in this court, and in the United States Supreme Court: Kelley v. Board of Education of City of Nashville, 139 F.Supp. 578 (M.D.Tenn.1956) (Dissolution of three-judge court); Kelly v. Board of Education of City of Nashville, 159 F.Supp. 272 (M.D.Tenn.1958) (Disapproval of integratin plan and grant to Board of additional tim :o file a new plan); Kelley v. Board of Education of City of Nashville, 8 R.R.L.R. 651 (M.D.Tenn. 1958) (Approval of 12-year plan);

Kelley v. Board of Education of City of Nashville, 270 F.2d 209 (6th Cir. 1959) (Upholding District Court order); Kelley v. Board of Education of City of Nashville, 361 U.S. 924, 80 S.Ct. 293, 4 L.Ed.2d 240 (1959) (Denial of certiorari); Maxwell v. County Board of Education of Davidson County, 203 F.Supp. 768 (M.D.Tenn.1960); Maxwell v. County Board of Education of Davidson County, 301 F.2d 828 (6th Cir. 1962), reversed in part and remanded sub nom. Goss v. Board of Education of Knoxville, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963); Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, 293 F.Supp. 485 (M.D.Tenn.1968) (Further proceedings in a consolidation of *Maxwell, supra,* and *Kelly, supra*); Kelley v. Metropolitan County Board of Education, 317 F.Supp. 980 (M.D.Tenn.1970); Kelley v. Metropolitan County Board of Education of Nashville, Tennessee, 436 F.2d 856 (6th Cir. 1970) (Memorandum opinion of the U. S. District Court (M.D.Tenn.) (filed June 28, 1971; Judgment (filed July 15, 1971)).

This case began in 1955 on the heels of the United States Supreme Court's decision in Brown v. Board of Education, *supra,* holding that "separate educational facilities are inherently unequal," *supra,* 347 U.S. at 495, 74 S.Ct. at 692. Plaintiffs, in a class action sought invalidation of the Tennessee school laws, T.C.A. §49-3701 et seq., which in specific terms required segregation of school pupils by race. (See Appendix A) In 1956 a three-judge federal court which had been convened to pass on the constitutionality of the state statute was dissolved when the defendant Board of Education conceded the unconstitutionality of the state statute by which it had previously been governed. Kelley v. Board of Education of City of Nashville, 139 F.Supp. 578 (M.D. Tenn.1956). The case was then remanded to the United States District Court for the Middle District of Tennessee. The District Judge determined that the case was an appropriate class action under Rule 23 of the Federal Rules of

Civil Procedure (Record, Min. Book 19 at 683). He ordered the defendant School Board to prepare and present a plan for desegregation of the Nashville schools.

Before judgment was entered, the State of Tennessee in January 1957 adopted a Parental Preference Law, T.C. A. § 49-3704, Pub.Acts 1957, cc. 9-13, 2 Race Rel.L.Rep. 215 (1957). (See Appendix A) This statute provided for separate white, black, and mixed schools, with attendance to be determined by parental preference. The District Court in September of 1957 held this statute to be unconstitutional on its face. 2 Race Rel.L.Rep. 970 (1957).

The defendant School Board thereupon (and nonetheless) presented a parental preference plan for white, black, and mixed schools substantially the same as that called for by the unconstitutional state law.

In February of 1958 the District Court held the School Board plan to be unconstitutional.

Later in the same year a grade-a-year desegregation plan was submitted by defendant School Board, approved by the District Court and the Court of Appeals, with certiorari denied by the United States Supreme Court.

In 1960 a suit was filed to desegregate the Davidson County schools. Maxwell v. County Board of Education of Davidson County, *supra*. It was brought on behalf of Negro children alleged to be denied their constitutional rights to equal education in the county school system. Again the suit was brought as a class action and recognized as such by the District Court under Rule 23 Fed.R.Civ.P. (Record, Min. Book 24 at 114.) The Davidson County School Board proposed a free transfer plan and it was approved by the District Court. On appeal Maxwell's free transfer plan was invalidated by the United States Supreme Court, *sub nom.*, Goss v. Board of Education of Knoxville, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963).

In 1963 the school systems of Nashville and Davidson County were then consolidated as part of a general consolidation of the City of Nashville and County of Davidson into one metropolitan government. Petitions for further relief, including an order to desegregate the Nashville-Davidson County schools and to enjoin further school construction pending such an order, were filed in the consolidated case, with additional plaintiffs intervening.

In 1968 the United States Supreme Court took further note of how the *Brown II* phrase "deliberate speed" was being employed to delay rather than to implement school desegregation.

For purposes of reemphasis, we again quote the unanimous opinion:

> [A] plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," Griffin v. County School Board, 377 U.S. 218, 234 [84 S.Ct. 1226, 12 L.Ed.2d 256] "the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered." Goss v. Board of Education, 373 U.S. 683, 689 [83 S.Ct. 1405, 10 L.Ed.2d 632]. See Calhoun v. Latimer, 377 U.S. 263 [84 S.Ct. 1235, 12 L.Ed.2d 288]. *The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work* NOW. Green v. County School Board of Kent County, 391 U.S. 430, 438-439 [88 S.Ct. 1689, 20 L.Ed.2d 716] (1968). (Emphasis added.)

On the heels of these decisions plaintiffs sought relief consistent with them and lengthy hearings followed. In 1970 the District Judge entered findings of fact which were subsequently

reviewed and given effect by this court. Kelley v. Metropolitan County Board of Education of Nashville, Tennessee, 436 F.2d 856 (1970). In its opinion this court said:

It would be well for those in authority in Nashville and Davidson County to read the able opinion [District Court opinion entered July 16, 1970] which we now revitalize by our present order. The emphasis in the quotation which follows is that of this court:

"[I]t is the Court's view that in the area of school zoning, school boards will fulfill their affirmative duty to establish a unitary school system only if attendance zone lines are drawn in such way as to maximize pupil integration. In drawing such lines, the defendant school board may properly consider in the total equation such factors as capacities and locations of schools, physical boundaries, transportation problems, and cost; however, none of these considerations can supersede the importance of the primary goal of maximizing integration.

"In looking to the facts of this case, the Court finds that many of the elementary and secondary school zone lines in the Nashville and Davidson County School System have not been drawn so as to minimize integration. *With the exception of zone lines drawn for new schools, the zone lines currently in existence were drawn prior to Brown* v. *Board of Education with the aim of maintaining segregation.* Though there has been some black population migration to formerly white areas, in large part *these zone lines continue to serve quite well the segregative purpose for which they were originally established.* The truth of this statement is made manifest when one examines the racial makeup of the pupil population in areas containing several contiguous attendance zones. In East Nashville, for example, there is a cluster of five elementary schools having contiguous attendance zones. Of these five schools, white pupils are in the great

majority in four schools, Baxter, Dalewood, Rosebank, and Bailey, while black students are in the majority in one of the schools, Inglewood. As a reference to the zone map will indicate, Inglewood is completely surrounded by the four predominantly white schools, and the Inglewood zone is drawn to enclose most of the black population living in the five school area. Defendants argue that they are applying the 'neighborhood' concept in the drawing of elementary school zone lines. *If such a concept is indeed being applied in this five school area, it appears to the Court that it is being applied solely to perpetuate segregation. Defendants contend that one of the prime advantages of 'neighborhood' schools is that they allow pupils to walk to and from school. If this is true, it is difficult to see why black pupils who live closer to Baxter or Bailey schools, for instance, are required to walk the greater distance to attend Inglewood school.*

"The same pattern is repeated in a seven school area in south and west Nashville. In this situation, the attendance zones for Ransom and Eakin schools are contiguous with the attendance zones for Ford, Greene, Head, Carter Lawrence, Murrel and Clemons schools. The former two schools are almost completely white, while the latter five schools are almost totally black.'

' See Map No. 2 in Appendix and note the following figures* on the enrollment of these schools:

	W	B	%B
Ford Greene	0	887	100
Head	0	791	100
Carter Lawrence	0	516	100
Murrel	0	328	100
Clemons	51	519	90
Ransom	355	2	1
Eakin	487	5	1

*Based on plaintiff's exhibit No. 3.

Once again it appears that the zone lines as drawn insure that white neighborhoods will have white schools and black neighborhoods will have black schools. *As the above two illustrations make clear, by maintaining the old dual school zones, defendant has encouraged continued segregation rather than significant integration in the elementary schools.*

"Turning to junior high school zones, the Court finds much the same situation as in the elementary school. Though the 'neighborhood' concept is not applied in secondary school zoning, junior high school zones are drawn so that each school serves a particular residential area or 'service area' as it is sometimes referred to by defendant. These service areas cover a broader geographic area than a single neighborhood, for several elementary schools within their respective neighborhood zones feed graduating students into the junior high school within whose zone they lie. This process is generally described in terms of a 'feeder pattern.' Once again, a look at the existing zone lines convinces the Court that the junior high school attendance zones and the 'feeder patterns' which graduate elementary students into the junior high schools are structured so as to foster for the most part continued segregation or at best only token integration. *It is apparent that the zone lines as presently drawn are designed to provide racially identifiable 'black' schools for black residential areas and 'white' shcools for white residential areas.* For example, looking at a cluster of six contiguous junior high school zones, the Court finds that Bass, West End, and Moore Junior high schools are all predominantly white schools with their attendance zones being drawn so as to correspond significantly with white residential areas. On the other hand, Washington, Rose Park and Waverly-Bellmont are all racially identifiable as black schools and their attendance zones have been drawn in a manner effectively to prevent a

significant number of black pupils from attending school outside of the black residential area.[8]

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[8] *See* Map No. 3 in Appendix and note the following figures:*

	W	B	%B
Bass	777	12	2
West End	578	40	6
Moore	999	85	8
Washington	0	1,347	100
Rose Park	11	527	98
Waverly-Belmont	26	260	91

* Based on plaintiff's exhibit No. 3.

"Finally, looking to the high school zones, there is similar evidence of continued duality in the school system. For example, of five contiguous high school zones, three of the schools, Cohn, Hillsboro and Central, are racially identifiable as white schools. Their attendance zone lines form the boundary line between the predominantly white residential areas in south and west Nashville and the black residential areas to the north and east. These black areas are served by Cameron and Pearl high schools.[9]

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[9] *See* Map No. 4 in Appendix and note the following figures:

	W	B	%B
Cohn	960	45	4
Hillsboro	1,223	15	1
Central	899	202	18
Pearl	1	1,308	100
Cameron	0	1,212	100

"In connection with the segregative effect of present school zoning, it is interesting to note that while portable classrooms are in limited use in predominantly Negro schools, approximately 117 portables are in use in racially identifiable white

schools. These predominantly Negro schools, on the basis of their rated maximum capacities, have approximately 5,400 vacancies, yet the white schools, in zones tailored to white residential sections, are overcrowded. It would seem that rezoning could serve the dual purpose of alleviating this overcrowding and, at the same time, promoting the goal of integration.

"It is the Court's conclusion that defendant's current policy of attendance zoning does not facilitate rapid conversion from a dual to a unitary school system. As is evident from the foregoing discussion, the zone lines as they presently exist foster continued segregation in many instances.[10] *Corresponding as*

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[10] Of the 139 regular schools in the system in 1969—70, 88 had less than 10% black enrollment, 22 had 10% to 40% black enrolling (with the total enrollment of these latter 22 schools constituting only 16% of the entire metropolitan school enrollment), and finally 29 schools had more than 40% black enrollment. A clear racial pattern is present.

they do to racial residential patterns, it is difficult to envision any other result. Historic zones lines which purposely promote segregation must be altered. In making such alterations defendant board should take those steps 'which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.' Green v. County School Board of New Kent County, *supra* [391 U.S. 430] at 442, [88 S. Ct. 1689, 20 L.Ed.2d 716]."

Kelley v. Metropolitan County Board of Education of Nashville, Tennessee, *supra* at 859—861. (Footnotes in quotation.)"

We then remanded the case with instructions:

> We believe that "the danger of denying justice by delay" in this case is as clear as it was in Alexander, *supra;* Green v. County Board, *supra,* and Carter, *supra.*

> We now vacate the stay of August 25, 1970, with the intention of leaving in full effect and operation the judgment of the District Court of August 13, 1970. The present District Judge should proceed immediately to hold the necessary hearing upon objections to the Board of Education plan and thereafter to approve or modify same as the record which is developed appears to require, and thereupon enter an order of implementation. The time schedule for consideration and implementation of this order should, of course, meet the "maximum" standard set forth by the Supreme Court in the second *Carter* case (Carter v. West Feliciana Parish School Board, 396 U.S. 290, 293, 90 S.Ct. 608, 24 L.Ed.2d 477 (1970)). The District Court may, of course, require reports (including a pupil locator map) and recommendations (including those of expert witnesses and the Department of Health, Education and Welfare) and consider them in its order of implementation. Id. at 862.

Acting within the terms of his sworn obligation a new District Judge proceeded to implement this court's instructions.

While he was thus engaged, the United States Supreme Court decided the third history making case pertaining to school segregation (Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971)). The opinion for a unanimous Supreme Court was written by Chief Justice Burger. In recital of the facts and conclusions of law, it parallels and controls our decision of this case.

> We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action. Brown v. Board of Education, 347 U.S. 483 [74 S.Ct. 686, 98 L.Ed. 873] (1954) (*Brown I*).

> This case and those argued with it arose in States having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what Brown v. Board of Education was all about. These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once. Swann v. Charlotte-Mecklenburg Board of Education, *supra* at 5—6, 91 S.Ct. at 1271 (Footnote omitted.)

These words apply exactly to the fundamantal problems in the instant case also. The District Court order here under review is designed to "eliminate racially separate public schools established and maintained by state action." Tennessee is, as we have noted above, a state "having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race." (See Appendix A) We here consider a District Court order designed to "implement dual systems and establish unitary systems at once."

> The District Court held numerous hearings and received voluminous evidence. In addition to finding certain actions of the school board to be discriminatory, the court also found that residential patterns in the city and county resulted in part from federal, state, and local government action other than school board decisions. School board action based on these patterns, for example, by locating schools in Negro residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods, resulted in segregated education. These findings were subsequently accepted by the Court of Appeals. Swann v. Charlotte-Mecklenburg Board of Education, *supra* at 7, 91 S.Ct. at 1272.

This paragraph applies to the facts of the instant case without change of a single word.

Chief Justice Burger then turned to the question of appropriate remedial measure to eliminate state imposed segregation:

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measure of *Brown II.* that was the basis for the holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S., at 437—438 [88 S.Ct. 1689, 20 L.Ed.2d 716].
>
> If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> * * * * * *
>
> In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.
>
> School authorities are traditionally charged with broad power to formulate and implement educational policy and

> might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to profer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system. Swann v. Charlotte-Mecklenburg Board of Education, *supra* at 15—16, 91 S.Ct. at 1275.

The default of school authorities referred to by Chief Justice Burger is equally illustrated by the history of our present case.

With this history and these principles before us, a tabular comparison of the fact situations and District Court plans presented in the *Swann* and *Kelley* case is appropriate:

	Swann v. Bd. Ed.	Kelley v. Bd. Ed.
Date of original complaints	1965	1955
No. of schools (before plan)	107 (1968—69)	139 (1970—71)
No. of schools (after plan)	107	133 (1971—72)
Total enrollment	84,000 (approx.)	94,170 (1970—71)
Per cent white students	71%	75% (75.12%)
Per cent black students	29%	25% (24.63%)
Walking distance (after plan)	1½ miles	1½ miles
No. students bused prior to plan	23,600	33,485
No. white students bused prior to plan	Exact figures not available, but it is clear that a large majority of students bused were white	30,000
No. black students bused prior to plan		3,500 (approx.)
Extent of segregation to plan	In 1969 ⅓ of the black students were then attending schools that were either totally or 99% black.	In 1969 81% of all white students were attending schools that were over 90% white, while 62% of all black students were attending schools that were over 90% black.

	Swann v. Bd. Ed.	Kelley v. Bd. Ed.
Net increase in No. of students bused as a result of court adopted plan	13,300	15,000 (approx.)
No. of additional buses required	138 54-passenger buses	82 84-passenger buses
No. of buses obtained to carry out plan	Court opinions do not contain this information.	None
Ratio of white to dent population employed by court approved plan as guide	71%—29%	75%—25%
Per cent of schools desegregated by plan within guide related ratios	100% of elementary* schools would have black student population of 9%—38%.	77% of elementary schools would have a black student population of 16%—41%; 22 outlying schools would have a black student population of 0% — 22%
One race schools remaining under plan due to travel distance	Apparently none	5

*Junior and Senior High Schools desegregation under the *Swann* plan was likewise considerably closer to ideal unitary school standards than the plan approved by the District Court in this case.

These figures show that during the three-year period nearly two-thirds of the black students in the Nashville system went to racially identifiable schools, and more than four-fifths of the white students attended racially identifiable schools.

Busing did not come to Nashville by federal court decree. This record demonstrates that Nashville and Davidson County have long used extensive bus transportation as a normal part of their school systems. Busing was, however, employed wholly disproportionately for the transportation of its white students as compared to its black students (30,000 white to 3,500 black). in this regard the District Judge's opinion noted:

> Since the defendants have consistently transported large numbers of students to promote segregation, some adjustment must be made to reverse this unconstitutional practice.

The District Court clearly found that defendants had defaulted in relation to their duty to dismantle their segregated school system prior to 1970. The District Court also found that although defendants had repeatedly been asked and ordered to produce an adequate plan, they had failed to do so. It noted that the School Board accepted as a policy statement "an ideal student racial ratio of an integrated school as one which is 15% to 35% black." Yet its analysis of the plan actually submitted by the School Board showed it to be utterly inadequate.

> The Board of Education submitted a plan for pupil integration in August, 1970. Included in this plan was a policy statement that the school board "accepts as an ideal student racial ratio of an integrated school as one which is 15% to 35% black."
>
> The August, 1970 plan made 49 minor geographic zone changes, and provided for the transportation of an additional 1162 pupils. The result of the plan was to leave the

The general principles of *Swann* were, of course, enunciated by the Supreme Court for guidance of District Courts and Courts of Appeals in *all* school segregation cases. In view of the close factual resemblances between this case and *Swann*, these principles, however, apply here a fortiori.

THE REMEDIAL ORDER OF THE DISTRICT COURT

The nature of the problem facing the District Court many years after Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), is vividly portrayed in the statistics and the table set forth below.[1]

Racial Composition for the Three Years Preceding Hearings on Motion for Further Relief

1967-68—85% of the white students attended schools that were over 90% white.

63% of the black students attended schools that were over 90% black.

1968-69—80% of the white students attended schools that were over 90% white.

61% of the black students attended schools that were over 90% black.

1969-70—81% of the white students attended schools that were over 90% white.

62% of the black students attended schools that were over 90% black.

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[1] These statistics are based largely upon plaintiffs' exhibits in the court below, but we can find no contrary evidence offered by defendants.

elementary schools significantly unchanged. Six of the 38 high schools and junior high schools would remain at least 50 per cent black. Fifty-seven per cent of the black high school and junior high school students would attend these six schools. The racial composition of two schools would be at least 95 per cent black and four other schools would be at least 90 per cent black. This would result in 47 per cent of the black students attending schools where the composition would be above 90 per cent black. Eight schools, acommodating 20 per cent of the black students, would operate with 15-35 per cent black students. Fifteen schools would operate with 95 per cent or above white students. (Footnotes omitted.)

Concerning the School Board plan, the District Court concluded:

The pupil integration plan submitted by the school board, viewed in the most favorable light, constitutes mere tinkering with attendance zones, and represents only a token effort. It clearly falls short of meeting the objectives and tests set out in the decisions of the United States Supreme Court. Swann v. Charlotte-Mecklenburg Board of Education, *supra;* Davis v. Board of School Commissioners, *supra;* Green v. County School Board, 391 U.S. 430 [88 S.Ct. 1689, 20 L.Ed.2d 716] (1968). In effect, the defendant has made no effort to meet its affirmative duty to establish a unitary school system "in which racial discrimination would be eliminated root and branch." Green v. County School Board, *supra,* at 437-438 [88 S.Ct. 1689, 20 L.Ed.2d 716]; quoted in McDaniel v. Barresi, [402] U.S. [39], [91 S.Ct. 1287] 28 L.Ed.2d 582, 585 (April 20, 1971).

Since the defendants have, in effect, failed to submit a constitutionally sufficient plan, the Court must examine the other plans. (Footnote omitted.)

The plan adopted by the District Judge was one proposed by the United States Department of Health, Education and Welfare. It is described in detail in his Memorandum Opinion, dated June 28, 1971, and in his Judgment, dated July 15, 1971, both of which are by reference hereby incorporated as a part of this opinion. For our present purpose it suffices for us to note that in all respects which have come to our attention, the HEW plan approved by the District Judge represents a somewhat less stringent approach to desegregation than the plan approved by the United States Supreme Court in *Swann, supra.*

Major portions of the Court's comprehensive Opinion and Judgment, such as those dealing with faculty desegregation, school construction and maintenance, and transfer policy, etc., are not discussed herein because no appellate issues have been presented as to those features.

I The Rule 23 Issue

As to the Rule 23 issue, earnestly if belatedly sought to be raised by appellants, we affirm the Memorandum Order of the District Judge, dated July 21, 1971, for the reasons set forth therein, and print same for ready reference as Appendix B.

[1] Further, we note that this issue was clearly waived by failure of appellants to raise it prior to trial and final adjudication of this case.

[2] We also note that such a class action as this dealing with continuing constitutional violations does not become moot because of years of delay (much of it attributable to appellants) which occasioned the graduation of the named, original student plaintiffs from the school system before final decision.

[6] Perhaps the primary thing that the *Swann* case decided was that in devising plans to terminate such residual effects, it is appropriate for the school system and the District Judge to take note of the proportion of white and black students within the area[2] and to seek as practical a plan as may be for ending white schools and black schools and substituting therefor schools which are representative of the area in which the students live.

We have noted that the District Judge in *Swann* employed a flexible 71% white to 29% black population ratio as a guide in seeking a practical plan. The Supreme Court specifically approved his doing so. *See* Swann v. Charlotte-Mecklenburg Board of Education, *supra,* 402 U.S. at 16, 23-24, 91 S.Ct. at 1267, 28 L.Ed.2d 554. The District Judge, in this case clearly read and followed the *Swann* guideline. As to this issue, we find no error.

[7] An earlier finding of "good faith" does nothing to excuse the defaults and failures shown by this record. "The measure of any desegregation plan is its effectiveness." Davis v. School Commissioners of Mobile County, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292, 28 L.Ed.2d 577 (1971). *See also* Green v. County School board, 391 U.S. 430, 439, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

III Practical Problems

[8] If there is an appellate issue of substance in this appeal, it is to be found in the practical problems which appellants claim have developed since the entry of the District Judge's order. Appellant summarizes these issues thus:

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[2] The area referred to in this case is all of Davidson County, including the City of Nashville, which is included in the jurisdiction of defendant Metropolitan Board of Education.

II The Ratio and Residual Effect Issues

(Plaintiffs' stated Issues 2, 3 & 4)

[3] Where a school system has been deliberately constructed on a segregated basis by state action, a duty inheres in the School Board to do more than to establish rules fair on their face which simply serve to perpetuate the effects of such segregation. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 26, 28, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

[4] The record in this case supports the District Judge's findings that racial discrimination in school construction, assignment of temporary buildings, assignment of teachers, and assignment of students continued until the close of the record—if not beyond. The record also discloses a background of racial discrimination by means of state law which motivated much of the school segregation. (See Appendix A)

[5] The fact that population shifts in the metropolitan school district have helped to some degree to change the racial composition of some schools during the course of litigation does not eliminate the duty of the school board to present a plan for a unitary school system.

Nor, of course, does it alter the duty of the District Court on default of the school board to require production of such a plan and order it into effect. Chief Justice Burger put the matter thus in the *Davis* case:

> Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. Davis v. School Commissioners of Mobile County, *supra*, 402 U.S. at 37, 91 S.Ct. at 1292.

> A plan which exposes the children in the school system to undue danger to health and accident, interferes with their education by requiring excessive periods of time on buses, causes them to leave home before daylight or to return home after dark, exposes them to the dangers of travel in old and inadequately maintained equipment and causes elementary school children, both black and white, to suffer hardships to which young children should not be exposed can hardly be termed feasible, workable, effective and realistic.

[9] Substantial as these problems appear to be on the surface, there are two reasons why no relief can be granted in this forum. The first is that no motion for relief pertaining to these facts has ever been filed by appellant in the District Court. These statements at this point are allegations and they are controverted by the appellee. This, of course, is an appellate court—not a trial court. As appellants well know, the arena for fact-finding in the federal courts is the United States District Court. Until these claims have been presented in a trial court, with an opportunity for sworn testimony to be taken and controverted issues and facts decided by the process of adversary hearing, this court has no jurisdiction.[3]

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[3] During the pendency of an appeal, jurisdiction of the case lies, of course, in the appellate court. There is, however, familiar law to deal with an unexpected problem which arises in this period concerning the actual terms of the order of judgment under appeal. The District Court may on being apprised of the problem and having determined its substantiality (with or without hearing) certify to the appellate court the desirability of a remand for completion or argumentation of the appellate record. No memory in this court encompasses a refusal of such a request.

The record is clear that no request for remand was made by the District Court, obviously, at least in part, because appellants made no motion for relief before the District Court.

The second reason as to why appellants are entitled to no relief on this issue probably serves to explain the first. The entire "record" upon which appellant bases his plea for relief as to practical problems is a "Report to the Court" of Dr. Brooks, Director of Schools of the Metropolitan County Board of Education. This report is dated October 18, 1971, just over a month after the opening of school. While we are advised that it was sent to the District Judge, as we have noted, no motion of any kind seeking any District Court action was ever filed concerning it. Even more important, the statement on its face suggests that local authorities in Nashville and Davidson County have not made good faith efforts to comply with the order of the District Judge.

Dr. Brooks' affidavit does present this exculpatory explanation which serves to point in the direction of other authorities as those responsible for the inconveniences and hazards of which Dr. Brooks' statement speaks. The statement says:

> The School Board is fiscally dependent in that its budgets must be approved by the Metropolitan City Council. In approving the budget of the School Board on June 30, 1971, Council members demanded assurance that no funds included in the budget would be used to purchase buses for the purpose of transporting students to establish a racial balance. The 1971-72 budget did provide for the purchase of 18 large buses to replace obsolete equipment to provide transportation for students to the new comprehensive McGavock High School.

[10] It is clear, however, that neither the Metropolitan City Council or, for that matter, the Legislature of Tennessee can forbid the implementation of a court mandate based upon the United States Constitution. In a companion case to *Swann, supra,* Chief Justice Burger, writing again for a unanimous court held that an anti-busing law which flatly forbids assign-

ment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools and which prohibits busing for such purposes was invalid as preventing implementation of desegregation plans required by the Fourteenth Amendment. North Carolina State Board of Education v. Swann, 402 U.S. 43, 45-46, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971). *See also* Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, 19 (1958).

Dr. Brooks' statement also furnishes the bus schedule of the Metropolitan County Board of Education by yearly models. It shows that the Board has an average of 18.9 buses for each of the last 10 model years. The 18 buses purchased in 1971 were described by Dr. Brooks as "to replace obsolete equipment." It appears from the Metropolitan Board's own statements that the Board and the local authorities in Nashville did not purchase one piece of transportation equipment for the purpose of converting the Metropolitan County Board of Education school system from a dual school system segregated by race into a unitary one, as called for by the District Judge's order.

[11] At court hearing we had been puzzled as to why counsel for the Board had failed to go back to the District Court to report on the grievous circumstances which he so strongly alleged before us. Like most decrees in equity, an injunctive decree in a school desegregation case is always subject to modification on the basis of changed circumstances. Sloan v. Tenth School District of Wilson County, 433 F.2d 587, 589-590 (6th Cir. 1970). Further acquaintance with the record, which, of course, the District Judge would have known in detail, leaves us in no further quandry as to the reasons for counsel's reluctance.

IV Plaintiffs-Appellants' Plan

[12] Our review of this record convinces us that the District Judge's choice of the HEW plan as opposed to plaintiffs' plan was well within his judicial discretion. It may not be ideal, but

to us it seems clearly to be a plan for ending a dual school system based on race and substituting therefor a unitary one. It promises to work and to work *now*. Green v. County School Board of Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

V. Plaintiffs-Cross-Appellants' Discrimination Claim

Plaintiffs-Cross-appellants claim that the grade school plan discriminates against Negro students in the lowest elementary grades.

The feature complained of in this issue is the transportation of black students in grades 1-4 to outlying schools, paralleled by the cross-transportation of white students in grades 5-6. In this regard the HEW plan appears to follow the pattern of the school plan approved in *Swann*. Swann v. Board of Education, *supra*, 402 U.S. at 10, 91 S.Ct. 1267, 28 L.Ed.2d 554. The Supreme Court made no reference to this feature, and neither in *Swann* nor in this case does the record seem to provide adequate rationale for it. We do not believe, however, that we can appropriately hold that the District Judge abused his discretion in approving the HEW plan which (like the plan in *Swann*) incorporated this feature.

It may be that this is a temporary expedient or it may be that there are practical reasons to justify it for longer duration. In any event, any adverse effects of this aspect of the plan can, of course, likewise be brought to the District Judge's attention when the case is back before him.

The Intervention

Twenty-four hours before oral arguments in this appeal, the United States Department of Justice filed a motion to intervene as amicus curiae. In spite of the extraordinary delay in filing the

motion, we granted leave to intervene and invited the representative of the Justice Department who appeared to address the court.

On reading the motion, hearing oral argument, and questioning counsel, we determined that the representative of the Justice Department had not had the opportunity to read the District Court record in this case and was not aware in advance of hearing that the claimed practical problems had never been presented to or adjudicated by the District Judge.

One America

This nation has been told by a Presidential Commission that our country is rapidly becoming divided into two societies—one black and one white. Report of National Advisory Commission on Civil Disorders 1 (3/1/68).

The Constitution of the United States was written for one nation, "indivisible." As it speaks to men's consciences, the Constitution argues against division and apartheid.

In the public domain, however, the Constitution commands. Here the constitutional command is One America.

The Constitution and the Supreme Court opinions quoted above do not command the use of busing any more than they command the use of books, desks, paper, pens, buildings, lights, heat, and other tools, equipment and supplies needed in modern life and in modern education. What the Constitution and the Supreme Court say about the principal issue of this case is that no one may forbid a school board (or a federal court) from employing any of the tools of modern life in carrying out a constitutional mandate. Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33, 37-38, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971).

The District Court order in this case specifically retained jurisdiction. Thus, upon our affirmance, the door of the District Court is clearly open (as it has been!) to the parties to present any unanticipated problems (not resulting from failure to comply with its order) which may have arisen or may arise in the future.

We now affirm the findings of fact, conclusions of law, and judgments of the District Court.

The District Judge's order noted that no stay would issue and we likewise note that any stay of this order must be sought from the United States Supreme Court.

APPENDIX

CHAPTER 37

SEGREGATION OF RACES

SECTION.

49-3701-49-3704.	[Unconstitutional.]
49-3701-49-3703.	[Unconstitutional.]

Compiler's Note. Under the decision of Roy v. Brittain (1956), 201 Tenn. 140, 297 S.W.2d 72, the status providing for the compulsory separation of races in the field of public education are no longer in effect, and therefore these sections have been omitted. They read:

49-3701. Interracial schools prohibited.—It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning. [Acts 1901, ch. 7, § 1; Shan., § 6888a37; Code 1932, § 11395.]

49-3702. Teaching of mixed classes prohibited.—It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent, or procurement. [Acts 1901, ch. 7, § 2; Shan., § 6888a38; Code § 11396.]

49-3703. Penalty for violations.—Any persons violating any of the provisions of this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars ($50.00), and imprisonment not less than thirty (30) days nor more than six (6) months. [Acts 1901, ch. 7, § 3; Shan., § 6888a39; mod. Code 1932, § 11397.]

49-3704. [Unconstitutional.]

Compiler's Note. This section was held unconstitutional in Kelley v. Board of Education (1959), 6 Cir. 270 F.2d 209 and is, therefore, omitted. It read:

49-3704. Separate schools authorized.—Boards of education of counties, cities and special school districts in this state are authorized to provide separate schools for white and negro children whose parents, legal custodians or guardians voluntarily elect that such children attend school with members of their own race. [Acts 1957, ch. 11, § 1.]

CHAPTER 22—TRANSPORTATION OF SCHOOL CHILDREN

SECTION.

49-2201. Power of boards to provide transportation—Use to achieve racial balance prohibited.

49-2210. Color and markings of buses.

49-2213. Speed limit.

49-2201. Power of boards to provide transportation—Use to achieve racial balance prohibited.—Boards of education many provide school transportation facilities for children who live over one and one-half (1½) miles by the nearest accessible route from the school to which they are assigned by the board of education and in which they are enrolled; provided, however, that the boards of education may, in their discretion, provide school transportation facilities for children who live less than one and one-half (1½) miles by the nearest accessible route from the school in which they are enrolled, but the county shall not be entitled to receive state transportation funds for any student, other than physically handicapped children, who live less than one and one-half (1½) miles by the nearest accessible route from the school in which they are enrolled; provided, that nothing in this chapter shall be construed to prevent a board of education from transporting physically handicapped children, regardless of the distance they live from school, under rules and regulations adopted by the state board of education; and provided further, that said boards shall have power to purchase school transportation equipment, employ school transportation personnel, and contract for transportation services with persons owning equipment, and pay for same out of funds duly authorized in the budget approved by the quarterly county court; provided further, that said boards in employing school transportation personnel and in contracting for transportation services with persons owning equipment are hereby authorized

to enter into contracts for such services for periods of time as long as, but not exceeding, four (4) years from the date of making such contracts, it being the purpose of this section to permit a reasonable degree of employment security for such school transportation personnel.

Provided, however, no board of education shall use or authorize the use of any school transportation facilities for the purpose of achieving a racial balance or racial imbalance in any school by requiring the transportation of any student or pupil from one school to another or from one school district established for his neighborhood to another. [Acts 1947, ch. 92, § 1; 1949, ch. 233, § 1; C.Supp.1950, § 2495.1 (Williams § 2495.2); Acts 1957, ch. 10, § 1; 1957, ch. 400, § 1; 1970 (Adj. S.), ch. 491, § 1.]

Amendment. The 1970 amendment added the last paragraph to this section.

Effective Date. Acts 1970 (Adj. S.), ch. 491, § 2. February 27, 1970.

[Note that a statute similar to the proviso in the last paragraph of the statute above was held unconstitutional by the United States Supreme Court. North Carolina State Board of Education v. Swann, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971).]

APPENDIX B

MEMORANDUM AND ORDER
(Filed July 21, 1971)

The defendant Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, filed two motions, to-wit, a motion to set aside the judgment entered in this cause

on July 16, 1970, and a motion to set aside the memorandum opinion filed June 28, 1971, which motions are grounded on the failure of the Court to comply with Rule 23 of the Federal Rules of Civil Procedure.

Apparently these motions were filed without counsel for the defendant having made even a casual perusal of the record in the consolidated cases.

The history of the consolidated cases reveals:

The first cause of Robert W. kelley, et al. v. Board of Education of the City of Nashville, Davidson County, Tennessee, et al., Civil No. 2094, was filed on September 23, 1955. This case will be hereinafter referred to as the "first case."

The case of Henry C. Maxwell, Jr., et al. v. County Board of Education of Davidson County, Tennessee, et al., Civil No. 2956, was filed on September 19, 1960. This case will be hereinafter referred to as the "second case."

These cases were consolidated by consent order filed September 10, 1963.

Rule 23 of the Federal Rules of Civil Procedure as to class action was amended, effective July 1, 1966. Prior to the amendment, class actions were referred to as "spurious" or "true" class actions. Prior to the amendment, the requirements for the maintenance and determination of the existence of a proper class action were less stringent than those requirements as set forth in Rule 23, as amended. Prior to its amendment, Rule 23 did not require detailed findings and determinations by the Court as set forth in subsection (c) of the Rule, as amended.

First Case

By Memorandum filed on January 21, 1957, the Honorable William E. Miller determined "that the rights of the plaintiffs

and others similarly situated to attend the public schools of the City of Nashville without discrimination on account of race are recognized and declared, . . ." Record, Min. Book 19, at 679.

By findings of fact and conclusions of law filed on February 20, 1957, the Honorable William E. Miller adjudicated that Case No. 2094 was "properly brought as a class action under Rule 23(a) of the Federal Rules of Civil Procedure. Title 28 U.S.C." Record, Min. Book 19, at 783.

On August 15, 1958, the case was appealed to the Sixth Circuit Court of Appeals. On July 20, 1959, the Court of Appeals affirmed the judgment of the District Court, thereby affirming the determination of the Honorable William E. Miller that this was a proper class action.

On September 10, 1963, a consent order was entered in Case No. 2094, the first case, and Case No. 2956, the second case, in which the parties agreed and stipulated that the functions and powers of the defendants Board of Education of the City of Nashville and County Board of Education of Davidson County were vested in the Metropolitan School System, and the "Transitional Board of Education for the Metropolitan Government of Nashville and Davidson County" was substituted as defendant. All orders, judgments, and other proceedings in the first case and the second case were made effective as to the substituted defendant. There was an express provision that all orders, judgments and proceedings entered previously would remain in full force and effect, and that none of the rights of the parties would be affected or prejudiced.

By order of December 3, 1964, the Metropolitan County Board of Education and its board members were made parties defendant in lieu of the Transitional Board. Again, there was a provision that all orders, judgments and proceedings in both cases would reamin in full force and effect and that none of the rights of any parties would be affected or prejudiced.

By order entered on October 7, 1968, certain additional parties, including infants and their parents, were added as intervening plaintiffs to have full standing as plaintiffs.

The two cases were again appealed to the Sixth Circuit Court of Appeals. The opinion of the Court of Appeals was filed in this Court on February 8, 1971.

Second Case

On November 23, 1960, the Honorable William E. Miller adjudicated that "this is a class action brought not only by the plaintiffs for their own benefit but also on behalf of all other persons similarly situated." Record, Min. Book 24, at 114.

This case was appealed to the Court of Appeals for the Sixth Circuit on February 20, 1961.

The orders in the consolidated cases of September 10, 1963, December 3, 1964, and October 7, 1968, noted above also apply to this case.

As appears above, the Honorable William E. Miller carefully adhered to Rule 23 as it existed at the time of the filing of these two cases. The Court of Appeals did not question his determination, but affirmed the actions which he took in the matter. In addition, in the latest mandate to the District Court received from the Court of Appeals in February, 1971, this Court was instructed to implement the July 16, 1970 opinion of the Honorable William E. Miller.

[13] This Court does not feel once a class action has been adjudicated and the action of the trial court has been reviewed by the Court of Appeals, that it is necessary or proper to continue to redetermine the standing of the plaintiffs to represent a class. The United States Supreme Court in its order implementing the amendment to Rule 23 states:

> ". . . the foregoing amendments and additions to the Rules of Civil Procedure shall take effect on July 1, 1966, and shall govern all proceedings in actions then pending except to the extent that in the opinion of the Court their application in a particular action then pending would not be feasible or would work injustice in which event the former procedure applies."*

See also Escott v. Barchris Construction Corp., 283 F.Supp. 643 (S.D.N.Y.1968); Polakoff v. Delaware Steeplechase and Race Assn., 264 F.Supp. 915 (Del.1966).

This clearly indicates an intent that there should not be a continuous readjudication of this question in cases where there has been a lengthy history of litigation, both in the district and the appellate courts. Frankly, this Court feels that it is not feasible or practical to have continuous adjudication of such items.

In view of the above, the Court is not required to determine (1) whether this question should have been raised prior to the adjudication of the cause, and (2) what, if any, effect the alleged failure to comply with Rule 23 would have on the right of the individual plaintiff children who reside throughout Davidson County, Tennessee, to assert their constitutional privilege to attend an integrated school in a unitary school system.

The motions are hereby denied.

L. CLURE MORTON
United States District Judge

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* Paragraph 2, Order of the Supreme Court of the United States, February 28, 1966, reporting amendments to the Federal Rules of Civil Procedure for the United States District Courts to the United States Senate and House of Representatives. This is reported in 15 L.Ed.2d lxxv.

McCREE, Circuit Judge (concurring).

I agree with the majority opinion on the issues it discusses. Nevertheless, I wish to add a few observations concerning our reasons for rejecting plaintiffs' cross-appeal and affirming for the present, the District Court's selection of the HEW plan.

The District Court, in deciding to reject plaintiffs' plan, recognized that under Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); Davis v. School Commissioners of Mobile County, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971); and Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), its duty was to select the plan that appeared to be the most effective in eradicating the effects of past segregation, unless it would be impractical to adopt such a plan. The court found that plaintiffs' plan was "impractical and not feasible" because of the costs and transportation problems that would result from the inclusion of certain outcounty schools in the plan. The court also relied upon the fact that plaintiffs' plan left to the school board the specifics of pupil assignment, grade organization, school structuring, and school district zoning.

My colleagues and I agree that there is no need at this juncture to hold that the District Court abused its discretion in thus preferring the HEW plan over that of plaintiffs. The HEW plan promises to accomplish a significant degree of integration, and it is a plan that promises realistically to work and to work *now*. Green v. County School Board of New Kent County, *supra*, 391 U.S. at 439, 88 S.Ct. 1689, 20 L.Ed.2d 716. Although plaintiffs' plan might have more effectively desegregated the district's schools, its inclusion of outlying schools and its lack of specificity rendered it, in the court's opinion, impractical and unfeasible. Since the District Court has retained jurisdiction in order to supervise the implementation and effectiveness of the HEW

plan, plaintiffs have the option of revising their plan to eliminate the defects noted by the court and requesting the court to make specific changes in the plan to promote, in a practical way, more effective integration. If the court should then find that plaintiffs' plan is "feasible and pedagogically sound," Robinson v. Shelby County Board of Education, 442 F.2d 255, 258 (6th Cir.), on remand 330 F.Supp. 837 (W.D.Tenn.1971), appeal pending, No. 71-1966 (6th Cir.), it would be required to adopt that plan. See Harrington v. Colquitt County Board of Education, 460 F.2d 193 (5th Cir. 1972); Monroe v. Board of Commissioners of City of Jackson, Tennesse, 453 F.2d 259, 262 (6th Cir. 1972), cert. filed, 406 U.S. 945, 92 S.Ct. 2045, 32 L.Ed.2d 333 (1972) (No. 71-1249); Robinson v. Shelby County Board of Education, *supra;* Davis v. School District of City of Pontiac, Inc., 443 F.2d 573, 576-577 (6th Cir.), cert. denied, 404 U.S. 913, 92 S.Ct. 233, 30 L.Ed.2d 186 (1971). In the special circumstances of this case, therefore, there is no need to remand and thereby possibly jeopardize implementation of the first desegregation plan ordered into effect in this school district that promises, after 17 years of litigation, realistically to work now.

With respect to plaintiffs' contention that the District Court abused its discretion in adopting a plan that places the greater burden of desegregation on black children and their parents, I observe initially that, although the plan approved by the Supreme Court in *Swann* appears to have contained a provision that in some respects resembles one of the features of the HEW plan attacked by plaintiffs herein—the pairing and clustering feature that required all children in grades one through four to attend suburban schools while all children in grades five and six attend the inner-city schools—*Swann* cannot be read as uncritically approving any plan employing a similar technique if it has an unreasonably disparate racial impact. The issue apparently was not raised in the Supreme Court and the Court did not discuss it. Moreover, the District Court in *Swann,* in ap-

proving the adoption of this feature of the school board's plan, did so "only (1) with great reluctance, (2) as a one-year, temporary arrangement, and (3) with the distinct reservation that 'one-way bussing' plans for the years after 1969-70 will not be acceptable." Swann v. Charlotte-Mecklenburg Board of Education, 306 F.Supp. 1291, 1298 (W.D.N.C.1969). And, following the Supreme Court's decision in *Swann,* the District Court rejected a revised plan proposed by the school board because, among other reasons, the plan continued to place a disproportionate burden on black children and their parents without showing any educational justification therefor. Swann v. Charlotte-Mecklenburg Board of Education, 328 F.Supp. 1346, 1352-1353 (W.D.N.C.1971).

Since I agree, however, that remand is not required at this time, and since I wish to make it clear what the majority opinion is *not* holding with respect to this issue, I add the following comments.

Without a compelling justification, adoption of a plan that places a greater burden of accomplishing integration on black students and their parents is impermissible, whether this be phrased in terms of an equal protection violation because the plan was the school board's product, *see, e. g.,* Lee v. Macon County Board of Education, 448 F.2d 746, 753-754 (5th Cir. 1971); Carr v. Montgomery County Board of Education, 429 F.2d 382, 385 (5th Cir. 1970); Brice v. Landis, 314 F.Supp. 974, 978-979 (N.D.Cal.1969), or in terms of an abuse of the court's discretion in fashioning an equitable remedy to rectify the effects of past injustice. Although adoption of such a plan might be justified on the basis of the nature of facilities involved, or on practical, administrative considerations, or on the need to adopt a temporary expedient to assure at least immediate substantial progress toward the creation of a unitary school system (*see* Swann v. Charlotte-Mecklenburg Board of Education, *supra,* 306 F.Supp. at 1298), we cannot determine the

reason for the District Court's decision because the court did not discuss this issue in its memorandum opinion. Ordinarily, in such a case, we would remand for findings and conclusions by the District Court. *See* Gordon v. Jefferson Davis Parish School Board, 446 F.2d 266 (5th Cir. 1971) (per curiam).

However, the same considerations that argue against remand on the issue of the court's adoption of a less effective plan are persuasive here as well. The integration plan adopted by the court has been in operation during the 1971-72 school year, and the court has retained jurisdiction of this case to oversee and, if necessary, to modify the plan's implementation. The defendant school board has indicated in this court that it intends to seek modification on the basis of asserted practical problems that have become apparent since the plan was put into effect. Plaintiffs have indicated dissatisfaction with the adoption of a plan less effective than that proposed by them, and we have indicated that they may seek further relief in the District Court. In these circumstances, I agree that we should not now disturb the District Court's approval of the HEW plan and possibly encourage the kind of delay and inaction that has caused this case to pend for 17 years. Plaintiffs may seek modification of the court's order on the ground that the plan places a disproportionate burden on black children and their parents, and this issue can be litigated and determined before the beginning of the 1972-73 school year. In this way, the disproportionate burden asserted by plaintiffs will exist at most for only a short period of time and will amount to no more than a transitory phase (assuming the absence of sufficient justification for maintaining it permanently) in the over-all creation of a unitary school system.

It is to be emphasized, nevertheless, that our refusal to take affirmative action on this issue at this time results only from the peculiar timing, posture, and history of this case. Our opinion

should not be construed in any way as a qualification of the principle that a district court has an obligation to endeavor to distribute the burden of integration equitably on all races and that any deviation from this norm, without a compelling justification, is impermissible.

Finally, I observe that the majority opinion does not discuss plaintiffs-appellees' contention that they should be awarded double costs and attorneys' fees because the school board's appeal is frivolous within the meaning of Fed.R.App.P. 38. Since the class action issue obviously has no merit, and since the only issue raised by the Board that might have merit has never been presented to the District Court, I would award the requested double costs and attorneys' fees. *See* Coppedge v. Franklin County Board of Education, 404 F.2d 1177, 1179-1180 (4th Cir. 1968); cf. Monroe v. Board of Commissioners of City of Jackson, Tennessee, *supra,* 453 F.2d at 262-263. The long history of this litigation would, in my opinion, make such an award particularly appropriate. *Cf.* Clark v. Board of Education of Little Rock School District, 449 F.2d 493, 499 (8th Cir. 1971), cert. denied, 405 U.S. 936, 92 S.Ct. 954, 30 L.Ed.2d 812.

No. 72-294. L. Goldstein's Sons, Inc., petitioner, v Trio Process Corporation

409 US 997, 34 L Ed 2d 262, 93 S Ct 319.

November 6, 1972. Motion of the Ford Motor Company for leave to file a brief, as amicus curiae, granted. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 461 F2d 66.

No. 72-313. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, C. R. Dorrier, Chairman, et al., petitioners, v Robert W. Kelley et al.

409 US 1001, 34 L Ed 2d 262, 93 S Ct 322.

November 6, 1972. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied. Mr. Justice Marshall took no part in the consideration or decision of this petition.

Same case below, 463 F2d 732.

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FILED
DEC 27 1982
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CLERK

No. 82-702

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,
Petitioners,

v.

ROBERT W. KELLEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

SUPPLEMENTAL BRIEF AND APPENDIX

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No. 82-702

IN THE

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OCTOBER TERM, 1982

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ROBERT W. KELLEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

SUPPLEMENTAL BRIEF AND APPENDIX

The Respondents have claimed in briefs previously filed with this Court that the District Court found in 1979 that the Board of Education has been guilty of *de jure* segregation. (Brief in Opposition, pp.12, 21-22; Reply to Brief of the United States, p.8 at n.4). In its brief supporting the Petition for Certiorari, the United States has indicated that the District Court's finding of *de jure* segregation "is problematic." (Brief for the United States as Amicus Curiae, p.4 at n.2). We have explained previously that the reference to "*de jure* segregation" made by

the District Court in 1979 was meant to be a description of the effects of the 1971 court order itself, not an indictment of the Board of Education. This interpretation was supported by the language in the District Court's opinion that expressly noted the Board's good faith implementation of the plan and by remarks made by the District Judge in open court. (Petition, pp.10-11 at n.5; Reply Brief, pp.2-3, p.4 at n.3; A-45; R. June 26, 1979 hearing, Vol. III, p.32).

After the filing of the briefs, the District Court held further hearings on matters not now before this Court.[1] During these hearings a significant colloquy between the District Court and Petitioners' counsel occurred that confirms our prior understanding of the District Court's use of the term "*de jure.*" We submit this Supplemental Brief with a copy of the transcript of the colloquy in the attached Appendix, pursuant to Rule 22.6 of the Rules of this Court.

As the transcript demonstrates, the District Court stated clearly and unambiguously that it "*never made*" a finding that the School Board has been guilty of *de jure* segregation. (emphasis added). To the contrary, and as we have argued previously, the language regarding *de jure* segregation was directed toward the geographic scope of the 1971 order itself, which in spite of the Board's good faith efforts in implementation, had resulted in some resegregation. (Petition, pp. 10-11 at n.5). The defects in the 1971 order, as demonstrated over the ensuing decade, were the impetus for the district court's new plan, not the actions of the Board of Education. Additionally, there is no basis

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[1] These hearings related primarily to Respondents' application for attorneys' fees.

for the contention that the School Board has engaged in unconstitutional activity within the past decade.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Brief and Appendix has been mailed this 23rd day of December, 1982, to the following counsel:

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WILLIAM R. WILLIS, JR.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

ROBERT W. KELLEY, et al.,

PLAINTIFFS,

VS.

METROPOLITAN COUNTY BOARD OF EDUCATION, et al.,

DEFENDANTS.

NASHVILLE CIVIL CASE NOS. 2094, 2956

OFFICIAL TRANSCRIPT OF EXCERPT

AT NASHVILLE

DECEMBER 6, 1982

BEFORE: Hon. Thomas A. Wiseman, Jr., United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

ROBERT W. KELLEY, et al.,

PLAINTIFFS,

VS.

METROPOLITAN COUNTY BOARD OF EDUCATION, et al.,

DEFENDANTS.

NASHVILLE CIVIL CASE NOS. 2094, 2956

APPEARANCES:

On behalf of the plaintiffs:

Avon N. Williams, Jr., Esq.,
Richard H. Dinkins, Esq.,
Theodore M. Shaw, Esq. and
Bill Lann Lee, Esq.

On behalf of the defendants:

William R. Willis, Esq. and
Marian Harrison, Esq.

MR. WILLIS: Now the plaintiffs have made a claim, Your Honor, both in the Court of Appeals and in the Supreme Court and they raise it again in memoranda filed in this case and that is that this case is not final because Your Honor found in 1980 that the School Board had been guilty of de jure segregation.

THE COURT: The Court never made such a finding.

MR. WILLIS: That is the position we have taken both in the Court of Appeals --

THE COURT: Never made such a finding.

MR. WILLIS -- and Supreme Court of the United States and still confronted with it daily from the pleadings of the plaintiff.

THE COURT: Well, words are capable of misinterpretation and I remember quite well I never did. That sentence was introduced with the preface or prefatory remarks about the good faith -- despite the good faith effort of the Board or something similar.

MR. WILLIS: Yes. As I understand, it meant that the order of this Court itself had resulted --

THE COURT: Yes, sir, because of the limitations of the applicability of the order to a circle within the boundaries leaving untouched the then white suburbs. Go ahead.

REPORTER'S CERTIFICATE

I, John W. Tummel, Official Court Reporter for the United States District Court, Middle District of Tennessee, with office at Nashville, hereby certify that I recorded on the Stenograph Shorthand Machine the proceedings held in open court on December 6, 1982, in the matter of: Robert W. Kelley, et al., versus Metropolitan County Board of Education, et al., Nashville Civil Case No. 2094, 2956; and that the proceedings in connection with this trial were reduced to typewriting under my supervision; and that the foregoing is a true and correct transcript of the same.

This the 14th day of December, 1982.

John W. Tummel

Official Court Reporter

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-702

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,

Petitioners,

—v.—

ROBERT W. KELLEY, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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No. 82-702

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,

Petitioners,

v.

ROBERT W. KELLEY, et al.

==========

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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BRIEF IN OPPOSITION

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Respondents Robert W. Kelley, et al., oppose the petition for certiorari.

Statement

This school desegregation action was originally filed in 1955, and has been the

subject of numerous judicial opinions.[1/] A brief history of the litigation follows.

1/ The published opinions include: Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, ___ F.2d ___ (6th Cir. 1982) (A-1); 511 F. Supp. 1363 (M.D. Tenn. 1981) (A-128); 492 F. Supp. 167 (M.D. Tenn. 1980) (A-62); 479 F. Supp. 120 (M.D. Tenn. 1979) (A-38); 372 F. Supp. 540 (M.D. Tenn. 1973); 372 F. Supp. 528 (M.D. Tenn. 1973); 463 F.2d 732 (6th Cir.), cert. denied, 409 U.S. 1001 (1972); 436 F.2d 856 (6th Cir. 1970); 317 F. Supp. 980 (M.D. Tenn. 1970); 293 F. Supp. 485 (M.D. Tenn. 1968); Goss v. Board of Education, 373 U.S. 683 (1963) (consolidated cases); Maxwell v. County Board of Education of Davidson County, 301 F.2d 828 (6th Cir. 1962); 203 F. Supp. 768 (M.D. Tenn. 1960); Kelley v. Board of Education of City of Nashville, 270 F.2d 209 (6th Cir.), cert. denied, 361 U.S. 924 (1959); 8 Race Rel. L. Rptr. 651 (M.D. Tenn. 1958); 159 F. Supp. 272 (M.D. Tenn. 1958); 139 F. Supp. 578 (M.D. Tenn. 1956).

The extensive history of the litigation is summarized in the opinions of the court of appeals, A-1 - A-5 (1982 opinion); A-186 - A-195 (1972 opinion), and the district court. A-64 - A-79 (1980 opinion); A-40 - A-45 (1979 opinion).

Prior Proceedings

"Tennessee's history of de jure segregation is well-established" (A-2). In 1955, when litigation aimed at desegregating the Nashville public schools began, racial segregation was constitutionally and statutorily mandated (A-2 - A-3). The school board's initial grade-a-year desegregation efforts resulted in de minimis desegregation because of transfer provisions which permitted parents to transfer a student to a school attended by pupils of the same race. 270 F.2d 209, 215 (6th Cir. 1959). This Court eventually held that such transfer provisions "promote discrimination and are therefore invalid." Goss v. Board of Education of Knoxville, 373 U.S. 683, 688 (1963).[2/] Substantial

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2/ In 1963, the Nashville and Davidson County school systems were consolidated,

segregation, however, continued as a result of the school board's attendance zone, portable classroom, teacher assignment and school construction policies, which the lower courts found to have been designed and implemented to maintain segregation. A-190 - A-195; 436 F.2d 856, 859-61 (6th Cir. 1970); 317 F. Supp. 980, 989-92 (M.D. Tenn. 1970). "It therefore is clear that when the first 'comprehensive and potentially effective desergation order' was entered in this case in 1971, the existing racial separation in the Nashville schools had resulted from de jure segregation." A-3 (1982 opinion), quoting, 463 F.2d 732, 734

2/ continued

and the Nashville case was consolidated with a parallel desegregation action filed in 1960 against the Davidson County schools.

(6th Cir), cert. denied, 409 U.S. 1001 (1972).

The 1971 desegregation plan approved by the district court provided for desegregation of Nashville and central Davidson County public schools, but left white schools on the periphery of the county segregated. Memorandum Opinion of June 28, 1971. A range of 15%± the district-wide percentage of black students, then 25%, was adopted as a "starting point"[3/] for student assignment by agreement of all the parties. Desegregation of elementary grades was accomplished by pairing and closing schools, and assignment of pupils, and desegregation of secondary grades by school closings and student assignment. The district court also took efforts to

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3/ Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 25 (1971).

prevent resegregation by enjoining use of portable classrooms to maintain segregation, expansion of schools exempt from desegregation requirements and all new school construction without prior court approval. Id.

However, only schools located in predominantly black neighborhoods were closed, a disproportionate burden of busing was imposed on black students at all levels and only black students in grades 1-4 were bused. Fully 1/3 of the county's white schools, located on the outskirts of the county, were exempt from the plan. Id. Nevertheless, the 1971 remedial order was affirmed over plaintiffs' objections. 463 F.2d 732 (6th Cir. 1972).

Post-1971 Proceedings

A year after the 1971 plan went into effect, the district court found that "the

integration plan was deficiently implemented" by the board and "the defendant school board ha[d] not make a good faith effort to comply with the court ordered integration plan" and "ha[d] endeavored to accomplish indirectly what it [could] not permissibly accomplish directly--the frustration of th[e district] court's plan to establish a racially integrated school system" by failing to "obtain sufficient buses to implement the court ordered integration plan." Order of August 17, 1972. The court thereupon ordered the school board to purchase sufficient buses to alleviate the hardships its practices had caused, and denied the board's motion to resegregate several junior high schools. The district court, however, failed to act on plaintiffs' request for more extensive desegregation and to eliminate the dispro-

portionate impact of school closings and transportation burden on black students.

Thereafter, from 1973-1978, the school board sought permission from the district court to engage in an extensive series of actions involving school construction, expansion of facilities, portable classrooms, the use of annexes and attendance zones. All these actions were opposed by plaintiffs as segregative and violative of the 1971 order. The district court declined to act. Notwithstanding the lack of court approval, all the proposals were implemented by the board. See A-40 - A-42.

It was not until 1979 that the district court held any hearings on the the board's 1973-1978 actions. The uncontradicted record, principally the testimony of school officials, established the board's widespread violation of the

1971 desegregation plan: The board had mounted an extensive construction program in predominantly white areas at a time the system was contracting, black innercity schools were underenrolled, and underutilized schools in black areas were being closed.[4/] A ring of comprehensive high schools had been built exclusively in white suburban areas while high schools in black inner city areas were closed or threatened with closing.[5/] Schools in white areas exempt from desegregation were expanded through the use of portable classrooms,

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4/ E.g., 1979 Tr., Vol. II, pp. 89 -98, 933-36, 961-62, 964, 1027-33; Vol. III, pp. 27-32.

The board reported to the court that one of the reasons for its construction program was to accommodate "the reluctance of the white community to participate in the Court's plan." May 30, 1973 Petition, p. 2.

5/ E.g., 1979 Tr., Vol. II, pp. 876-77, 957-59.

additions, and annexes.[6/] School closing and construction policies resulted in imposing a greater burden of transportation on black students.[7/] No efforts were made to relieve segregation of black students or disproportionate transportation burden.[8/] No efforts were made to relieve overcrowding in white schools by assigning white students to underutilized schools in black

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6/ E.g., 1979 Tr., Vol. I, pp. 162-65, 170-72, 200A-205; Vol. II, pp. 899-901, 930-31, 970-74.

16 of the 22 white suburban schools left segregated were expanded with the use of portable classrooms in the 1973-74 school year. At the 1979 hearings, the district court observed that "the establishment of ... annexes [at schools exempted from desegregation] bears the patent stamp of subterfuge." Tr. of June 26, 1979, Hearing, Vol. I, p. 200A.

7/ E.g., 1979 Tr. Vol. I, pp. 174-77, Vol. II, pp. 741-43, 752, 873-78.

8/ E.g., 1979 Tr., Vol. I, p. 129, Vol. II, pp. 853, 890-94, 1027-33.

neighborhoods.[9/]

After hearing this proof, the district court found that:

> 1. The perimeter line drawn by the Court in 1971, by which no requirement of either transportation or attempts at racial balance, was mandated outside the perimeter, has encouraged white flight to the suburbs, and to those school zones unaffected by the 1971 order. The combined effort of the order and the flight therefrom, either to suburban public schools or to private schools, has been:
>
> a) that inner city schools have become progressively resegregated;
>
> b) that the projected ideal ratio of 15 percent to 35 percent

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9/ Board officials admitted that one of the reasons white students were not bused to inner city schools was deference to white hostility to desegregation. Tr. of June 26, 1979, Hearing, Vol. II at pp. 901, 932-36, 1038. As the district court put it, the board had deliberately decided to "accommodate white flight in the suburban areas" and "to follow the white flight" by its construction program instead of assigning students to existing schools." Tr. of June 26, 1979, Hearing, Vol. III, at pp. 28-29.

black population in each school has become increasingly more difficult to meet;

c) that the school facilities outside the Court-ordered perimeter have become increasingly inadequate to accommodate the growing student bodies.

2. The resegregation, resulting, at least in part, from the nonetheless good faith efforts of the School Board in the implementation of the Court's order, amounts to a de jure segregation.

A-44 - A-45, 479 F. Supp. 120, 122-23.[10/]

10/ Resegregative actions were initiated by the board up to the eve of trial. The court found that in 1978-79 the board initiated transfer option for students assigned to Pearl High School, a predominantly black school located in a black Nashville neighborhood, which was "utilized extensively by white students assigned to Pearl to escape such assignment. ... The effect of this policy upon the already-established trend toward resegregation at Pearl was disastrous." Id. at 124. The bord was directed to take immediate action because of "the urgency of the situation," but another transfer policy for Pearl was subsequently found to have "a negative impact upon the desegregation efforts of the School Board" in school year 1979-80. Id. 129.

The school board was ordered to and did file a proposed desegregation plan in February 1980, and further hearings were held. The board's plan provided for: (a) use of a range based on the 32% present black systemwide student enrollment as a starting point for student assignment; (b) continued placement of schools with grades 1-4 in white suburban areas and schools with grades 5-6 in inner city areas, requiring continued disproportionate burden of busing of younger black children; (c) assignment of most black junior high students to suburban junior high schools in white areas; and (d) retention and augmentation of its comprehensive high school, system. See A-86 - A-95.[11/]

11/ Plaintiffs opposed the board's proposal because of the disproportionate burden of busing imposed on black students,

The district court rejected the proposal because "the plan submitted by the Board disparately onerates young black children with the burden of achieving desegregation." A-113. However, the court questioned the lack of "realistic promise of achievement" of further desegregation in light of white flight and the "social, educational and economic costs of student transportation" A-114. Rejecting the use of any racial range reflective of district-wide enrollment as a starting point for student assignment, the court directed the board to file another plan which would provide for K-4 neighborhood schools, middle schools with a minimum presence of

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11/ continued

discriminatory closing of schools in black areas, and failure to provide remedial and other programs for black students left in segregated schools.

15% either race (thus permitting 85% black schools and 85% white schools), a high school plan, including an inner city comprehensive school, the use of magnet schools, and remedial and other programs for black students. A-116 - A-127.

The board's 1981 plan provided for: (a) 47 of 75 K-4 schools more than 90% single race with 14 schools more than 75% black; (b) 24 middle schools with 7 projected to be majority black and assignment of black students to schools in outlying white areas but no assignment of sutdents from outlying areas to schools in black areas; and (c) remedial, multicultural and other programs. Exhibits 267-71. Plaintiffs' desegregative alternative pro-

posal was rejected,[12/] and the board's 1981 plan was adopted. A. 128.

Plaintiffs appealed. On August 19, 1981, the 1981 plan was stayed by the Sixth Circuit and the appeal expedited. A-155. The board's motion to vacate the stay was subsequently denied by Justice Stevens as Circuit Justice, Metropolitan County Board of Education v. Kelley, 453 U.S 1306 (1981), A-157, and then by the full Court. 50 U.S.L.W. 3198 (1981).

The Decision Below

On July 27, 1982, the Sixth Circuit issued its opinion which affirmed in part and reversed in part the judgment of the

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12/ Under plaintiffs' alternative proposal, only 10 of the 75 K-4 schools were over 90% white and none over 90% black, and only 2 of the 24 middle schools were majority black. Exhibits 283-84.

district court, and remanded for further proceedings. A-1, A-22. First, the Court affirmed the finding of the board's continuing liability, i.e., that "despite the 1971 plan's potential, the record establishes and the District Court found that desegregation in the Nashville schools had never been achieved." A-3.

> [The Court's] determination that desegregation has never been achieved in the Nashville-Davidson County school system is amply supported by the record, and that finding, therefore, is affirmed. Thus the School Baord remains under its duty "to eliminate from the public schools all vestiges of state-imposed segregation." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971).

A-5.

Second, the "educational components" of the board's 1981 plan, including the remedial, Afro-American studies and other programs and a junior high school magnet program, were affirmed on the basis of

Milliken v. Bradley, 433 U.S. 267 (1977) (Milliken II). A-5 - A-6.

Third, the court of appeals affirmed all aspects of the middle and high school plan, except the use of the 15% either race minimal presence standard on the basis of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).[13/] The court directed the use of a racial range based on districtwide enrollment as a "starting point." A-9, A-10.

13/ The Sixth Circuit stated that:

> The District Judge selected the admittedly arbitrary 15% either race figure because "it seem[ed] to represent a reasonable attempt to provide intercultural and interracial contact as a foundation for social harmony." 492 F. Supp. at 193. This selection, and such other errors as we find in the District Court's opinions and orders, originate with his apparent conclusion that the unanimous opinion of the Supreme Court in Swann has somehow been overruled or eroded. But

Fourth, the Court reversed the automatic exclusion of grades K-4, from a desegregation plan, and instructed the district court to include such students in a pupil assignment program "except where inclusion would 'risk the health of the children or significantly impinge on the educational

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13/ continued
the disposition of cases originating in this and other circuits does not support any such conclusion. In fact, Swann was strongly reaffirmed by the Supreme Court's approval of this court's opinion in Penick v. Columbus Board of Education, 583 F.2d 787 (6th Cir. 1978), aff'd, 443 U.S. 449 81979). The Swann opinion is the law of the land. And this Court, the District Court for the Middle District of Tennessee, and the School Board of Nashville and Davidson County are required by our constitutional form of government to follow its standards. In accordance with those standards, the District Judge will be required on remand of this case to determine the currently prevailing racial population of the school system concerned and to employ that ratio as a "useful starting point in shaping a remedy to correct past constitutional violations."

process' within the meaning of Swann." A-19.

Fifth, the Court affirmed the denial of plaintiffs' claims that the 1981 plan itself placed a disproportionate transportation burden on black middle school students and that Pearl High School should be expanded into a comprehensive high school. A.-21. The district court also was ordered to consider long delayed faculty assignment, contempt and attorneys' fees issues. A-22. Last, the Court concluded that "[t]he delays in this case suggest that absolute priority be accorded to this litigation until a unitary system has been achieved." Id.

Judge Celebrezze concurred in the court's decision to affirm in part, but dissented from reversal of the student assignment plan. A-26.

On remand, the district court has yet to order a new student assignment plan.

REASONS TO DENY THE WRIT

1. Petitioner school board argues that Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976), absolved the board of any constitutional duty to desegregate once the 1971 plan was put into effect. Pet. 9-10. That contention is supported by neither Spangler nor any other authority, and can only be maintained by wholly ignoring specific factual findings of the board's own wrongdoing. The district Court found that the board's initial implementation efforts were "deficient," "not made [in] good faith" and intended to "frustrat[e]" the plan. See, pp. 6-7, supra. The courts below found that widespread resegregation subsequently occurred, and that "[t]he resegregation resulting at

least in part from the nonetheless good faith efforts of the School Board in the implementation of the Court's order, amounts to a de jure segregation." See, p. 12, supra. Findings that the board "violated the spirit of the 1971 order and emasculated desegregation efforts," A-5, were concurred in by both courts below, are not clearly erroneous and are entitled to substantial deference.[14/] "It is beyond dispute that Nashville has never achieved unitary status, in part because of the Board's implementation of the 1971 plan" A-11 n.5.

14/ Rodgers v. Lodge, ___U.S. ___, 50 U.S.L.W. 5041, 5044 (1982); Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1979); Berenyi v. Information Director, 385 U.S. 630, 635 (1967); Blau v. Lehamn, 368 U.S. 403 (1962); cf., Columbus Board of Education v. Penick, 443 U.S. 339, 468 (Burger, C.J., concurring).

In Spangler, on the other hand, a student assignment desegregation plan had been fully complied with, prior unconstitutional assignment practics cured and racial concentrations resulted solely from intervening demographic changes. Not only were no such findings made here: precisely contrary findings were made that the original constitutional violation was compounded by specific acts of the board which resegrgated the school system. See Columbus Board of Education v. Penick, 443 U.S. 449, 454-63 (1979).

The appropriate authority is cases in which a school district's default of its affirmative obligation to "effectuate a transition to a racially nondiscriminatory school system," Brown v. Board of Education, 349 U.S. 294, 301 (1955), required exercise of judicial authority. Columbus Board of

Education v. Penick, 443 U.S. 449, 458-59 (1979), affirming, 583 F.2d 878 (6th Cir. 1978); Dayton Board of Education v. Brinkman, 443 U.S. 526, 538 (1979), affirming, 583 F.2d 243 (6th Cir. 1978); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15-16 (1971); Green v. County School Board, 391 U.S. 430 (1968). The familiar rule in school desegregation litigation is that: "In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system," Swann, supra, 402 U.S. at 16,[15/] and that the

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15/ The board erroneously ignored that "[e]ach instance of a failure or refusal to fulfill [its] affirmative duty continues the violation of the Fourteenth Amendment," Penick, supra, 443 U.S. at 458; Wright v. Council of City of Emporia, 407 U.S. 451, 460 (1972), that good faith alone is no bar to relief. Id.; Green, supra, 391 U.S 438-41.

obligation of a court is to "make a every effort to achieve the greatest degree of actual desegregation, taking into account the practicalities of the situation." Davis v. School Comm'rs of Mobile County, 402 U.S. 33, 37 (1971).

2. Nor is any substantial federal question or conflict among the circuits presented by the decision of the court

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15/ continued

The board's suggestion that resegregtion occurred solely because of interim demographic changes and residential segregation is contrary to specific factfindings, see pp. 11-12, supra, and unsupported by the record. The only evidence presented by the board was a statistical comparison of student enrollment from 1967-70 and 1971-79, which did not take into account the board's implementation actions or any other factor. Tr. of March 3, 1980, Hearing, Vol. VII, pp. 6280-6320. Such proof cannot pretend to meet the requirements of Penick, supra, 443 U.S at 465 n.13; Keyes v. School District No. 1, 413 U.S. 189, 202-03 (1973). In any event, school officials noted that demographic change was underway prior to the 1971 plan. Tr. of June 26, 1979, Hearing, Vol. II, p. 729.

of appeals that a 15% either race minimum presence standard for secondary schools did not promote desegregation. Pet. 11. The court below was correct that the minimum presence standard was unnecessarily segregative,[16/] unprecedented, "admittedly arbitrary," and adopted for reasons other than curing unconstitutional segregation, i.e., "'a reasonable attempt to provide intercultural and interracial contact as a foundation for social harmony.'" See, p. 20 n.13, supra. The court was plainly correct in its commonsense direction to the district court to use a range based on districtwide racial proportion as a "'useful starting point in shaping a remedy to correct past constitutional violations,'"

16/ Under plaintiffs' alternative proposal, which was based on the board's 1981 plan, greater levels of desegregation were achieved. See p. 16 n.12, supra.

A-9, quoting, Swann, supra, 402 U.S. at 25.

The Sixth Circuit did no more than carefully and conscientiously reiterate at length the dictates of Swann, A-7 - A-10, for the guidance of the district court.[17/] Such guidance was appropriate because unitary status had not been ac-

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17/ The court stated that Swann recognized "that there is no constitutional right to any 'particular degree of racial balance,'" but also that "'in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition.'" A-10.

The court below emphasized that:

> An essential element of the plan on remand thus will include "reassigning students to achieve the greatest possible number of desegregated schools." See Liddell v. Board of Education of City of St. Louis, 667

hieved after 27 years of litigation, the district court in fact had adopted an erroneous standard, and the district court operated under the mistaken notion that Swann was not binding. As the court put it, its directives were "made necessary by our view that 'a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is ... intolerable'" A-11

17/ continued

> F.2d 643 (8th Cir. 1981). We reemphasize that we are not requiring any precise degree of racial mixing, but we are requiring the District Court to use all reasonable methods of pupil assignment to achieve the maximum amount of integration possible.

A-11 n.5. The lower court thus did not require imposition of a "fixed racial quota." Pet. 12. Nor is there any conflict with Liddell, Pet. 13, which was specifically cited for the guidance of the district court.

n.5, quoting, Green supra, 391 U.S. at 438.

The decision of the court of appeals to give the district court specific guidance was made on the basis of its substantial experience with the litigation gained over the course of hearing five appeals.[18/] See pp. 1-2 n.1, supra. The decision was entirely proper and no review is necessary. Moreover, no claim could be made that use of a Swann student assignment range is inappropriate in Nashville: the school board agreed both in 1971 and in 1980 that such a standard was appropriate and filed plans which used comparable ranges. See pp. 5, 13, supra.

3. Nor is it necessary for the Court to review the lower court's equitable in-

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18/ Chief Judge Edwards, author of the opinion below, has authored the last three appellate decisions.

struction to the district court that children in lower grades should be included in a desegregation plan "except where inclusion would 'risk the health of the children or significantly impinge on the educational process' within the meaning of Swann." A-19. That instruction comports in every way with Swann, supra, 402 U.S. at 29-31, and is consistent with all lower court authority.[19/] This is not a case in which circumstances exist which make

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19/ E.g., Adams v. United States, 620 F.2d 1277 (8th Cir.), cert. denied, 449 U.S. 826 (1980); Lee v. Macon County Board of Education, 616 F.2d 805 (5th Cir. 1980); Haycraft v. Board of Education, 585 F.2d 803, 805 (6th Cir.), cert. denied, 443 U.S. 915 (1979); Keyes v. School District No. 1, 521 F.2d 465 (10th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); Flax v. Potts, 464 F.2d 865 (5th Cir.), cert. denied, 409 U.S. 1007 (1972).

The lower court's extensive discussion of the relevant precedent, A-17 - A-19 n.9, clearly demonstrates that no conflict exists.

the busing of students in lower grades inappropriate or in which prior practices need be changed: every black student in grades 1-4 residing in central Davidson County has been bused to schools in white suburban areas since 1971. See pp. 5-6, supra.

4. Last, the school board argues that the court of appeals somehow "ignored the standards of review articulated by this Court for review of a desegregation decree." Pet. 15. The court below, however, plainly stated that "the District Court's approval of the Board's plan was [both] legal error" and "an abuse of discretion," A-20 n.11, and accompanying text, because the district court's remedial rulings bore no relationship to undisputed findings of continuing constitutional violation, were not intended to cure unconstitutional

segregation and were inconsistent with this Court's basic jurisprudence in school desegregation cases. As the lower court put it, this case "offers no new legal issues and can and must be decided on the basis of final decisions of the United States Supreme Court." A-2. Plainly, the directions of the court below to apply the teachings of Swann and other authority on remand cannot be characterized as pressing the limits of an appellate court's powers.

The board erroneously suggests that the failure of the 1971 plan to include "educational components" was a serious equitable defect which the court of appeals ignored. Pet. 17-19. The Sixth Circuit, of course, affirmed the 1981 plan's "educational components."[20/]

20/ Moreover, the record does not support any claim that student transportation

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20/ continued
remedies have had adverse consequences on the achievement of black students. The entire record below on this issue consists of testimony by plaintiffs' educational consultant that one-way busing of black students in grades 1-4 to outlying white schools was bad educational policy that had adverse impact on the education of black students. Suppl. Record 184, pp. 10-13, 40-41, 59-65, 131-33, 317-18. The remedy proposed was that busing of students in grades 1-4 involve proportional numbers of black and white students so that some black lower grade students would be able to attend schools in their neighborhoods, and that the board devise programs for students bused to schools outside their neighborhoods that addressed the need to provide a supportive learning environment and continuity of instruction. Id. Moreover, recent dispositive social science evidence cited by the court of appeals in its appendix, A-11 - A-26, documents that desegregation raises the achievement levels of black students.

The board's related claim that plaintiffs' request for "educational components" and equitable distribution of the burdens of desegregation compromised their request for more effective desegregtion, Pet. 5, is incorrect. Milliken v. Bradley, supra (remedial programs); Monroe v. Board of Comm'rs, 391 U.S 450, 458 (1968) (a school board may not desegregate in a "deliberately discriminatory manner"). After full briefing below, neither the majority nor dissent gave the claim any credence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 82-702

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,
Petitioners,

v.

ROBERT W. KELLEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

REPLY BRIEF

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Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 1,5,6,7

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For the Sixth Circuit

REPLY BRIEF

The issues herein concern the proper interpretation of this Court's decisions in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971) and *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424 (1976) and, more broadly, the ability of district courts across the nation to respond to the need to modify decade-old desegregation decrees in light of changing conditions. The Sixth Circuit improperly rejected pupil assignment portions of the 1981 plan approved by the District Court and required that new school attendance zones be drawn to approximate the current racial population of the County despite the fact that a school desegregation plan has

been in place for ten years. Although full argument on the merits of these questions is properly reserved for briefing on the merits, we take this opportunity to reply to the Respondents' Brief in Opposition:

1. The District Court stated in 1981 that "[t]he good faith efforts of this [School] Board to achieve desegregation have been amply demonstrated." A. 153. Nonetheless, the Respondents contend that the School Board has engaged in continuing constitutional violations since the implementation of the 1971 plan. Brief in Opposition ("Br. Opp.") 31. Yet the Respondents can refer to no explicit holding of a lower court to support their assertion because, quite simply, there is none. The Respondents rely solely on scattered phrases culled from the lower court opinions that fail to support their assertion.

Respondents first quote from the District Court order of August 17, 1972, in which the District Court criticized the School Board's first year of implementation of the 1971 plan and ordered it to take certain additional actions, including the purchase of school buses. Br. Opp. 21. As we explained in our Petition for Certiorari ("Pet.") 10 n. 5, the District Court has never, since the 1972 order was put into effect, held that the School Board has obstructed the system-wide implementation of the 1971 plan. Actions now a decade old, which were rectified when the 1971 plan was fully implemented, cannot now support the Sixth Circuit's requirement that each school district be redrawn to reflect the current racial makeup of the school system.

Respondents also rely on the conclusion of the District Court that the implementation of the 1971 plan constituted *de jure* segregation because it encouraged population shifts to parts of the County not included within the desegregation remedy. It is clear, however, that the District court was referring to its own actions as *de jure*. The District Court said that "[t]he perimeter

line drawn by the Court in 1971. . . has encouraged white flight to the suburbs and to those school zones unaffected by the 1971 order . . . . The resegregation, resulting, at least in part, from the nonetheless good faith efforts of the School Board in the implementation of the Court's order, amounts to a *de jure* segregation." A. 44-45. As the District Judge further explained in open court, "it appears to me that the previous Court action . . . has contributed to resegregation . . . and to the extent it has, this Court is of the opinion — I don't know whether there is any case law to support it — but that is *de jure* action rather than *de facto* action." Pet. 10 n. 5. The finding of "*de jure*" segregation relied upon by the Respondents thus does not reflect upon the actions of the School Board.[1]

The Respondents note that the District Court stated in 1979 that the School Board's administration of an optional transfer program as it affected one largely black high school conflicted with the "spirit" of the 1971 plan, A. 56-57, and that this observation was repeated by the Court of Appeals, A. 5. Yet the District Court simultaneously refused to hold the School Board in contempt of court because the Board had not been given adequate notice that its actions might conflict with the District Court's orders. A. 56. Indeed, the District Court concluded that

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[1] Respondents also mischaracterize the District Court's comments concerning the accommodation of white flight in the suburban areas through new construction. Br. Opp. 11 n. 9. The reference by the Court to accommodation was not an indictment of the School Board's actions — indeed, no construction in the areas excluded by the 1971 order had been undertaken. Rather, the Court was questioning the feasibility of bringing young students from those excluded areas to the innercity, routes the Court had rejected in 1971 because of "practical considerations, common sense, and judgment." A. 169. The District Court's ultimate answer to this question was incorporated into the 1981 plan and essentially confirmed the 1971 exclusion for elementary students after the judge himself had traveled some of these lengthy routes. According to the Court, the distances and inconveniences produced by such long routes "defie[d] logic and create[d] an almost impossible barrier to liaison between parent and teacher." A. 113-14; Tr. of June 26, 1979, Hearing, Volume III, at p. 26-28.

a contempt of court order would violate due process. A. 56-57. Taken in context, therefore, the District Court's observation does not justify the Respondents' conclusion, *see*, Br. Opp. 23, that the School Board has within the past decade engaged in the type of unconstitutional conduct with system-wide impact that this Court found in *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 454-63 (1979). Nor, given the absence of a finding that the School Board had violated the Constitution and the fact that the School Board's actions affected only one school, could a court have so characterized the School Board's actions.[2]

Finally, the Respondents note the Court of Appeals' statement that the school system has yet to achieve unitary status. As the *Spangler* Court emphasized, however, this fact alone does not permit a federal court "to rearrange its attendance zones . . . so as to ensure that the racial mix desired by the court was maintained in perpetuity," once "a racially neutral attendance pattern" has been implemented. 427 U. S. at 435-36.[3] The Sixth

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[2] The Respondents' reliance on the 1979 District Court statement was not shared by the Court of Appeals. That court did not purport to rely upon the School Board's conduct affecting one high school to justify its creation of a new plan for the entire school system. Presumably, the Sixth Circuit recognized that any problem existing in the administration of the optional transfer program had been cured by the 1981 plan and that, in any event, this issue could not justify its refusal to permit the 1981 plan constructed by the District Court to go into effect.

[3] In a footnote, the Court of Appeals also said that the failure to achieve unitary status was in large part because of "the Board's implementation of the 1971 plan." A. 11 n.5. The court may have been referring to the effects of the 1971 plan criticized by the District Court, *see*, pp. 2-3 *supra*. In any event, the suggestion that the School Board "implemented" the 1971 plan and that the plan has yet to achieve unitary status does not mean, as the Respondents suggest, that the School Board has committed continuing constitutional violations. A desegregation plan may be in place for some time before a federal court concludes that the effects of pre-plan constitutional violations have been fully vitiated. *See, Spangler* v. *Pasadena City Board of Education*, 611 F. 2d 1239 (9th Cir. 1979).

Circuit's order that the District Court redraw attendance zones to reflect the current racial makeup of the school system — which was not based on any finding that the School Board within the past decade had obstructed the system-wide implementation of the 1971 plan — directly conflicts with this Court's decision in *Spangler.*[4]

2. The Respondents argue that the Sixth Circuit "carefully and conscientiously" applied the dictates of *Swann* v. *Charlotte-Mecklenburg Board of Education* when it refused to allow the implementation of the 1981 plan. Br. Opp. 27. The Respondents have not challenged the fact that the "District Court's modification of the pupil assignment portion of the plan creates more integrated schools for secondary students" than continued use of the 1971 plan. Pet. 11. Both the Respondents and the Sixth Circuit believe that *Swann* bars a modification to a desegregation plan that increases integration merely because the plan is not explicitly designed to reflect within each school the racial balance of the school system. That is a sure sign that *Swann* is being seriously misread by litigants and courts alike.

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[4] The Respondents claim that the School Board has "erroneously ignored that '[e]ach instance of a failure or refusal to fulfill [its] affirmative duty continues the violation of the Fourteenth Amendment.' " Br. Opp. 24 n. 15, *quoting, Columbus Board of Education* v. *Penick,* 443 U.S. at 459. The School Board has ignored nothing — the quoted language from the *Columbus* case concerns a school board's affirmative duty to dismantle a segregated system before a court-ordered desegregation plan exists. Once a desegregation plan has been put into effect, the inquiry shifts to whether subsequent changes in the racial makeup of the school system were caused by the school board's actions. *Pasadena City Board of Education* v. *Spangler,* 427 U.S. at 435. Neither the District Court nor the Court of Appeals made findings of fact that would support the conclusion that the actions of the School Board in the last ten years have caused resegregation of the school system.

3. The Respondents also embrace the Sixth Circuit's mistaken interpretation of the *Swann* Court's approval of busing as a permissible remedy. Respondents themselves characterize the Court of Appeals as having instructed the District Court to order the busing of children in grades K-4 unless busing risks the health of the children or significantly affects the educational process. Br. Opp. 30-31. *Swann* recognizes that busing is permissible; it does not mandate the transportation of pupils. Pet. 14. The proper inquiry is whether a desegregation plan is effective, *see, Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971), not — as the Sixth Circuit and respondents believe — merely whether it includes the busing of young school children. The Respondents' brief thus further demonstrates that this Court's *Swann* decision has been widely misunderstood.

4. The Respondents attempt to justify the Court of Appeals' "failure to address the issue of the effectiveness of the desegregation plan," A. 35 (Celebrezze, J., dissenting), by claiming that the district court committed legal error and ignored "undisputed findings of continuing constitutional violation." Br. Opp. 31. As we have demonstrated in our Petition for Certiorari and in this Reply, the District Court committed no legal error by refusing to adopt the Sixth Circuit's mistaken interpretation of *Swann* v. *Charlotte-Mecklenburg Board of Education*. As we have also explained, one will search in vain in either the District Court or the Court of Appeals opinions for the "undisputed" conclusion that the School Board has committed a continuing constitutional violation in the last decade. There is no difficulty in ascertaining, however, that the District Court explicitly applauded "[t]he good faith efforts of this [School] Board to achieve desegregation." A. 153. Quite simply, the Respondents have offered no legally sufficient ra-

tionale that supports the Court of Appeals' refusal to allow implementation of the District Court's 1981 plan.[1]

Respectfully submitted,

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[1] Although the Court of Appeals did not reverse the District Court's findings of fact as clearly erroneous, the Respondents challenge the District Court's finding — based upon the testimony of Respondents' own witness — that young school children would be best served by a lessened emphasis on busing and a greater emphasis on remedial and cultural education. Pet. 5-6. The Respondents base their contention upon "dispositive social science evidence" contained in an appendix to the opinion of the Court of Appeals. Br. Opp. 33 n. 20. This evidence was never introduced in the District Court and the School Board has never had an opportunity to cross-examine the authors of the study or to introduce evidence in rebuttal. We do not understand the Court of Appeals to have rejected the District Court's findings on the basis of information that was not part of the record. Rather, the Sixth Circuit, because of its mistaken understanding of the *Swann* decision, reversed the 1981 plan despite the District Court's findings of fact.

I hereby certify that a copy of the foregoing reply has been mailed this 10th day of November, 1982, to the following counsel:

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In the Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL., PETITIONERS

v.

ROBERT W. KELLEY, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in ruling that Supreme Court precedent prohibited the district court from excluding grades K-4 from the mandatory transportation provisions of a school desegregation plan notwithstanding the district court's findings that inclusion of these grades would produce unacceptable educational, social and economic costs.

2. Whether the court of appeals erred in ruling that the district court was required by *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), to use the system-wide ratio of black to white enrollment in fashioning a desegregation plan.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL., PETITIONERS

v.

ROBERT W. KELLEY, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE UNITED STATES

The United States has participated either as a party or as an amicus curiae in most school desegregation cases the Court has heard on the merits. See, *e.g.*, *Brown* v. *Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955); *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Green* v. *County School Board*, 391 U.S. 430 (1968); *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Wright* v. *Council of Emporia*, 407 U.S. 451 (1972); *School Board* v. *State Board of Education*, 412 U.S. 92 (1973); *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973); *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976); *Dayton Board*

of Education v. *Brinkman*, 433 U.S. 406 (1977); 443 U.S. 526 (1979); *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979); *Estes* v. *Metropolitan Branches of Dallas NAACP*, 444 U.S. 437 (1980). Our interest in these cases stems from our authority to enforce federal civil rights laws that prohibit school districts from denying persons an equal educational opportunity on the basis of race. Titles IV, VI and IX of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000c-2; 2000d; 2000h-2; Equal Educational Opportunities Act of 1974, 20 U.S.C. (& Supp. IV) 1701 *et seq.*

STATEMENT

1. Black school children commenced a class action school desegregation suit against the Board of Education of the City of Nashville in 1955. In the late 1950's the district court approved and the court of appeals affirmed (270 F.2d 209, cert. denied 361 U.S. 924 (1959)) a grade-a-year desegregation plan. A separate suit was filed against the Davidson County Board of Education in 1960 and a similar desegregation plan was approved for that system. See *Maxwell* v. *County Board of Education*, 203 F. Supp. 768 (W.D. Tenn. 1960), aff'd, 301 F.2d 828 (6th Cir. 1962), rev'd in part sub nom. *Goss* v. *Board of Education*, 373 U.S. 683 (1963). In 1963 the city and county school systems merged and both suits were consolidated. No significant action occurred for six years.

2. In 1970 the district court ordered the Metropolitan County School Board to devise a comprehensive school desegregation plan for the Nashville metropolitan area in view of the failure of the previous plans to achieve desegregation.[1] After rejecting a plan proposed by the Board, the

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[1]The racial composition of the school district at that time was approximately 75% white and 25% black. Nearly 81% of all white students attended schools that were more than 90% white and 67% of all black children attended schools that were more than 90% black (Pet. App. A-199).

court approved, with some modifications, a plan proposed by the United States Department of Health, Education, and Welfare that established 15 to 35% as the "ideal student racial ratio" for each school in the district (Pet. App. A-69). The techniques used to achieve that ratio of black students in each school (geographic zone changes, clustering, and contiguous and non-contiguous pairs) required the Board to bus approximately 13,000 more students (about 14% of the total student population) than were previously bused (*id.* at A-69 to A-70). No pupil reassignments, however, were required in 33 schools located on the periphery of the county because the district court found that it was not feasible to include them in the plan (*ibid.*). Both parties appealed and the court of appeals affirmed the plan in all respects (*id.* at A-179). This Court denied certiorari (409 U.S. 1001 (1972)).

After remand, plaintiffs again sought modification of the plan on the ground that it placed a disparate burden on black children (Pet. App. A-77). For the most part, black children in grades 1-4 were bused out of the inner city to attend suburban elementary schools while white students were bused into the inner city for grades 5-6 (*id.* at A-83 to A-88). Plaintiffs also asked the court to hold the Board in contempt for constructing schools and making other changes in student assignments without prior court approval (*id.* at A-76 to A-77).

These motions were not considered until 1979 when the district court held hearings on desegregation within the system since 1971 (Pet. App. A-38). The court found that the 1971 plan had encouraged "white flight" to schools on the perimeter of the district where race conscious pupil

assignments had not been required, thereby producing significant resegregation (*id.* at A-44). The court concluded that "[t]he resegregation, resulting, at least in part, from the nonetheless good faith efforts of the School Board in the implementation of the Court's order, amounts to a *de jure* segregation" (*id.* at A-45).[2] The Board was therefore ordered to submit a new desegregation plan that encompassed the entire metropolitan area.

3. In May 1980 the district court entered an opinion and order rejecting parts of the Board's proposed plan and specifying changes that needed to be made to obtain court approval (Pet. App. A-62). The Board's initial plan was similar in many respects to the 1971 plan, except that all schools in the metropolitan area were required to reassign students for purposes of racial integration.[3] The court acknowledged that the proposed plan would achieve "an initial racial mix in which blacks will, in nearly all cases, be in the minority" (*id.* at A-109), but it nevertheless rejected certain aspects of the plan. The court concluded that the School Board need not utilize a four-tiered rather than a three-tiered grade structure solely to facilitate racial balance. The court noted that the four tiered structure of

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[2]The district court's finding of continued de jure segregation, based as it is on the "good faith efforts of the School Board in the implementation of the Court's order * * *" (Pet. App. A-4 to A-5), is problematic. See *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976). Petitioners did not, however, contest the district court's finding of continued de jure segregation on appeal. That finding, therefore, is not at issue here. See, e.g., *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975).

[3]The plan proposed use of a four-tiered educational system (grades 1-4, 5-6, 7-8, and 9-12), with black students in grades 1-4 being bused to suburban elementary schools and white students being bused into inner city schools in grades 5-6. This structure was necessary in order to achieve a black enrollment in most schools that reflected the system-wide percentage of black students (32%), plus or minus 20% (Pet. App. A-82 n.31, A-86).

the Board's proposed plan was selected "against [the Board's] better educational judgment," and it therefore permitted the Board to revert to the preferred three-tiered structure (*id.* at A-116). The court further ordered the Board to "construct its first tier of kindergarten through early elementary grades" using schools "of a neighborhood character" (*id.* at A-116 to A-117). The court held that schools in the middle tier should have the objective "of bringing about a minimum presence of at least 15 percent of either race in the minority at each middle school" (*id.* at A-117). The court also ordered the Board to devise remedial and inter-cultural programs for grades K-4, with the funds saved by reduced transportation needs applied to the costs of these programs (*id.* at A-124 to A-125).

The court found that its modification of the Board's proposal was justified by nine years of experience under the 1971 plan as well as several days of testimony and hundreds of exhibits bearing on the educational, social and economic costs associated with the techniques embodied in the Board's proposed plan (Pet. App. A-108 to A-116). The court found that "white flight" was a "significant problem" in Nashville as a result of the 1971 plan (*id.* at A-110) and that by the late 1980's private schools would enroll 25 to 30% of elementary age children in the metropolitan area (*ibid.*). The court concluded that previous efforts to achieve a desegregated school system had been "less than fruitful, if not to some extent counterproductive" (*id.* at A-111) and that the Board's plan was "uniformly predicted to engender further exodus from the public school system" (*id.* at A-114).

The Board's proposed plan was found to place a disparate burden on young black children by requiring them to leave their neighborhoods in the early primary grades while white children remained in their neighborhoods during those years (Pet. App. A-113). The court found that the

distances young black children had to travel to their assigned schools created "an almost impossible barrier to liason between parent and teacher" (*ibid.*). The court also noted that the Board's use of non-contiguous school attendance zones in the early grades prevented children from participating in extracurricular activities (*id.* at A-115). The court questioned whether the plan's emphasis on achieving system-wide racial ratios required too many concessions to sound educational practices in the early grades. The Board, for example, chose a four or five-tiered grade structure rather than "the educationally preferred three-tiered system" in order to achieve racial balance (*ibid.*). A three-tiered system, the court noted, allows greater continuity in the instruction offered children in the early grades (*ibid.*). The court finally noted that "[t]he allocation of a finite amount of resources to transportation costs rather than educational improvement" was an inherent part of the Board's proposed plan (*ibid.*). The court concluded that reallocating those resources to reducing pupil-teacher ratios rather than busing students would produce substantial educational benefits (*ibid.*).

4. The Board modified its proposed desegregation plan in light of the district court's order and submitted it for court approval in 1981 (Pet. App. A-128 to A-129). The modified plan included certain educational components (such as remediation and black studies programs) not provided for in the earlier plan; it established 75 neighborhood attendance zone elementary schools for grades K-4 or K-5;[4] and it projected that most middle schools and high schools would fall within the court's 15% desegregation standard by 1984. The district court approved the Board's modified plan

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[4]The revised plan contemplates that students assigned to 31 elementary schools will be able to walk to school. Under the plan currently in operation, there are only five walk-in elementary schools (Pet. App. A-146).

and ordered implementation of the interim provisions of that plan. That order was stayed by the court of appeals pending appeal (Pet. App. A-155) and this Court refused to vacate the stay (*id.* at A-157).

4. On appeal, the court of appeals (Celebrezze, J., dissenting in part) affirmed in part and reversed in part (Pet. App. A-1). The court approved the educational components of the modified plan (*id.* at A-5 to A-6), but it rejected the pupil assignment components of the revised plan for two reasons.

First, it held that, as a matter of law, this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23-25 (1971), rendered inappropriate the use of 15% of either race as a "starting point" for devising a desegregation plan in a system that was 68% white and 32% black (Pet. App. A-6 to A-7). The court ruled that *Swann* required the district court to use the system-wide black-white pupil ratio as the "starting point" (*id.* at A-9) and it ordered the district court on remand to use that ratio (plus or minus a 15% deviation) in revising the pupil assignment provisions of the plan (*id.* at A-10).

Secondly, the court of appeals labelled as "fundamental error" and "unconstitutional" that provision of the plan that zoned grades K-4 on a neighborhood basis (Pet. App. A-12). It rejected the district court's findings regarding the educational benefits of the neighborhood school system on the ground that under *Swann* such benefits "cannot outweigh the constitutional requirement to desegregate the schools" (*id.* at A-14). It directed the district court on remand to include these children in a non-neighborhood pupil assignment program "except where inclusion would 'risk the health of the children or significantly impinge on the educational process' within the meaning of *Swann*" (*id.* at A-19).

Judge Celebrezze dissented from the majority's treatment of the pupil assignment provisions of the plan because he believed the majority did not adequately address the district court's findings of fact (Pet. App. A-26). He concluded that *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 417-418 (1977), made it incumbent upon the majority to reject the district court's findings only if they are clearly erroneous; the court of appeals should not reverse the district court merely because it is " 'vaguely dissatisfied with the limited character of the remedy which the district court ha[s] afforded plaintiffs' " (Pet. App. A-31 to A-32). He also concluded that *Swann* allowed district courts discretion to exempt certain grades from the pupil assignment provisions of a desegregation plan where, as here, the district court made extensive, well-supported factual findings regarding the likely failure of a busing program that included these grades (*id.* at A-34 to A-35). Judge Celebrezze also disagreed with the majority's interpretation of *Swann* on the use of racial ratios. He read *Swann* to permit rather than to require a district court to use a system-wide ratio in devising a desegregation remedy (*id.* at A-33) and he expressed the fear that the majority's order would, as a practical matter, create a right to a particular racial balance in all schools in violation of *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 434 (1976) (Pet. App. A-34). Lastly, Judge Celebrezze faulted the majority for failing to give proper weight to the district court's evaluation of the effectiveness of certain desegregation remedies (*id.* at A-35 to A-37). He concluded, after a careful reading of the entire record, that the district court had complied with the dictates of *Swann* and *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and that it had not abused its discretion in fashioning the desegregation plan (Pet. App. A-35 to A-37).

REASONS FOR GRANTING THE PETITION

This case presents questions of fundamental importance concerning the proper interpretation to be given *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). The court of appeals, without holding clearly erroneous any of the district court's findings concerning the educational, social and economic costs of requiring mandatory transportation in grades K-4, ruled that these factors could not, as a matter of law, justify the refusal to use this desegregation technique for those grades. It also rejected the middle school and high school desegregation plans, despite their effectiveness in desegregating those schools. because the district court had not used the system-wide ratio of black and white students as the "starting point" in fashioning those components of the plan. As noted by Judge Celebrezze in dissent, however, *Swann* does not foreclose the district court from considering educational, social and economic costs in fashioning relief nor does it require the district court to use a system-wide racial ratio in the manner prescribed by the court of appeals.

1. "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 15. But this Court has never stated that this objective must be achieved regardless of the costs to individual students or the educational system as a whole. Rather, the "task * * * is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution" (402 U.S. at 16). In balancing those interests, moreover, the district courts must be guided by their "basic sense of fairness" and by their sense of what is "feasible," "workable" and "realistic" (402 U.S. at 31). They must also take "into account the practicalities of the situation."

Davis v. *Board of School Commissioners*, 402 U.S. 33, 37 (1971). "There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." *Green* v. *County School Board*, 391 U.S. 430, 439 (1968). The court's function is to " 'desegregate an *educational* system in which the races have been kept apart, without, at the same time losing sight of the central *educational* function of the schools.' " *Milliken* v. *Bradley*, 433 U.S. 267, 280 n.15 (1977), quoting *Milliken* v. *Bradley*, 418 U.S. 717, 764 (1974) (White, J., dissenting) (emphasis in original).

Swann does not mandate the use of any particular remedial device but instead indicates in general terms which devices are permissible and what the limits on their use might be. For example, the Court held that the pairing and grouping of noncontiguous school zones was a "permissible tool," but the Court also recognized that there are limits as to "how far a court can go" in using this device (402 U.S. at 28-29). The Court emphasized that when the travel time or distances made necessary by the use of desegregation techniques becomes so great as to "either risk the health of the children or significantly impinge on the educational process," the courts should restrict their use (402 U.S. at 30-31). The Court also acknowledged that the age of the children being transported is perhaps the most important factor to be considered in evaluating the feasibility of a desegregation plan requiring transportation (402 U.S. at 31).

In this case, the district court attempted to balance several conflicting interests in fashioning a proper desegregation remedy for grades K-4. Since its inception, the plaintiffs had maintained that the 1971 desegregation plan placed a disparate burden on black children in grades 1-4 by requiring them to be bused out of their neighborhoods to

predominantly white suburban schools while white children attended neighborhood schools and were not bused to inner city schools until grades 5-6 (Pet. App. A-77 to A-88). The Board's proposed plan continued that same objectionable busing pattern. Plaintiffs, moreover, adduced evidence to show that black children were being deprived of certain educational benefits that white children enjoyed by virtue of their proximity to their schools (see *id.* at A-136).[5] In addition, the court found that the present plan and the Board's proposed plan would inevitably result in an increase in "white flight" (*id.* at A-110 to A-111). When faced with this evidence and plaintiffs' demands for a greater number of predominantly black schools (*id.* at A-7 to A-98), the court concluded that it was not constitutionally obligated to use desegregation techniques that would necessitate the transportation of students in grades K-4. Instead, the court implemented a neighborhood school system that sought to eliminate the effects of past discrimination by means of intercultural exchange and intervention-remediation programs (*id.* at A-140 to A-145).

The court of appeals simply ignored the extensive cost/benefit analysis undertaken by the district court in fashioning its desegregation plan and instead directed the court to reinstitute mandatory transportation for grades K-4. The court of appeals did not rule that the district court's findings regarding the educational benefits of neighborhood schools and the significance of "white flight" were clearly erroneous, nor did it take issue with the district court's finding that

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[5]These benefits included better continuity between kindergarten and the early grades (Pet. App. A-132 to A-133); greater opportunities for parent-teacher communication and parental involvement in school programs (*id.* at A-115); and opportunities for participation in extracurricular activities (*ibid.*). These benefits may be of special importance to blacks because their reading scores were found to lag substantially behind the reading scores of white students in the district (*id.* at A-112 n.46).

the Board's proposed plan (and by necessary implication the 1971 plan) placed a disparate burden on black children. The court of appeals' decision, therefore, severely restricts a district court's ability to assess the effectiveness of an earlier decree in light of experience and to modify it accordingly. Its decision in effect requires the district court to disregard conflicting interests and to achieve a specific racial mix regardless of the costs to the educational system as a whole and to black children in particular.[6]

The court of appeals adopted too restrictive an interpretation of *Swann*. We submit that *Swann* does not preclude district courts from considering competing educational, social and economic costs or from holding, as the district court did, that "transportation of young children which 'risk[s] the health of the children or significantly impinge[s] on the educational process' is to be avoided" (Pet. App. A-116, quoting *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 30-31).[7] The issue, moreover, is surely one warranting plenary review by this Court. Lower courts, school boards, and governmental enforcement agencies are clearly in need of guidance regarding the proper interpretation of *Swann*.

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[6]The court of appeals' treatment of the disparate burden question is especially troublesome in view of that court's 1972 decision suggesting that this issue be brought to the attention of the district judge on remand (Pet. App. A-210), and Judge McCree's concurring opinion that stresses the importance of this consideration in fashioning relief (*id.* at A-222 to A-223).

[7]If, as we believe, the district court's interpretation of *Swann* is correct, the court of appeals' decision must be reversed. The court of appeals did not hold that the district court's findings regarding the impropriety of mandatory busing in grades K-4 were clearly erroneous. See *Pullman-Standard* v. *Swint*, No. 80-1190 (Apr. 27, 1982), slip op. 12-16.

2. The court of appeals' rejection of the middle school and high school pupil assignment plans also rests upon what we believe to be a misapplication of *Swann*. The appellate court decision was based solely on the district court's failure to use the system-wide black to white student ratio as the "starting point" in fashioning relief.[8] *Swann* approves the "very limited use" of such ratios as a remedial tool, but it expressly forbids courts from making attainment of these ratios an "inflexible requirement." *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 25. "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole" (402 U.S. at 24). Judge Celebrezze correctly stated that the practical consequence of the court of appeals' ruling is to impose such a requirement here (Pet. App. A-34).

The projections for black enrollment in each middle school and comprehensive high school by 1984 demonstrate that the plan approved by the district court promised to be effective. Those data show that in the twenty-four middle schools black enrollment would range from 11.7% to 79.5% and that half of those schools would fall within the range mandated by the court of appeals order (17% to 47%

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[8]The district court's 15% of either race standard was not a "starting point" but a minimum standard. It was adopted upon the recommendation of plaintiffs' expert witness, Dr. Hugh Scott (Pet. App. A-118).

black).[9] At the ten comprehensive high schools black enrollment would range from 14.9% to 59.2% and half of those schools would fall within the range mandated by the court of appeals.[10] The district court was not obligated to devise a plan that insured that the racial composition of each school would reflect the racial composition of the system as a whole. "The clear import of * * * *Swann* is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom." *Milliken* v. *Bradley, supra,* 418 U.S. at 740, 741; see also *Wright* v. *Council of Emporia,* 407 U.S. 451, 464 (1972); *Pasadena City Board of Education, supra,* 427 U.S. at 434. The contrary conclusion of the court below warrants this Court's review.

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[9]The projections for percentage black enrollment in the middle schools are: Joelton 39.5; Goodlettsville 20.1; Dupont (Jr.) 19.6; Neely's Bend 17.2; Ewing Park 70.8; Cumberland 60.8; Highland Heights 59.2; Meigs 79.5; East 24.8; Litton 27.3; DuPont (Sr.) 18.6; Donelson 14.8; Two Rivers 17.8; Cameron 17.1; Rose Park 76.7; Wright 11.7; Apollo 14.1; Antioch 14.0; McMurray 21.0; Moore 19.9; Pearl 77.4; Cohn 51.0; Bass 34.5; Bellevue 15.3 (J.A. 574) (J.A. refers to the joint appendix filed in the court of appeals).

[10]The projections for percentage black enrollment in the high schools are: Whites Creek 56.4; Goodlettsville-Madison 14.9; Maplewood 59.2; Stratford 31.6; McGavock 15.1; Glencliff 21.2; Overton 17.1; Hillsboro 27.7; Hillwood 30.7; Pearl-Cohn 57.7 (J.A. 575).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 82-702

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,

Petitioners,

v.

ROBERT W. KELLEY, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE AND RESPONDENTS' REPLY TO BRIEF OF THE UNITED STATES

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OCTOBER TERM, 1982

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METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,

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v.

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==========

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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MOTION FOR LEAVE TO FILE REPLY BRIEF

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Respondents respectfully request leave to file the attached reply to the brief of the United States.

The petition for a writ of certiorari was filed October 22, 1982. Respondents' brief in opposition was filed November 2,

1982. The brief for the United States as amicus curiae in support of petitioner was filed on or around November 12, 1982, and not received by respondents' counsel until November 17, 1982. Accordingly, respondents have had no opportunity to respond to the brief of the United States.

Respectfully submitted,

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On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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RESPONDENTS' REPLY TO BRIEF OF THE UNITED STATES

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Respondents reply as follows to several arguments advanced by the United States.

1. The United States asserts that the district court interpreted Swann v. Charlotte-Mecklenburg Board of Education, 402

U.S. 1 (1971), as permitting consideration of certain "educational, social and economic costs in fashioning relief" with respect to pupil assignment. Brief, pp. 9-12. That claim has no basis in the record. The district court was of the erroneous view that Swann no longer had precedential value because "the definition of a 'unitary' school system has expanded from Brown to Milliken from a mere destruction of barriers, to pupil assingment, to remediation and quality education." A-106, see A-105-113. The court, therefore, rejected as altogether inapplicable the use of any "Swann-type remedy" as "a 'more-of-the-same' type of remedy," A-108, 109, after "weighing benefits of the Swann-type remedy against its burdens." A-136. As the court of appeals properly concluded: "[t]he errors ... we found in the District

Court's opinions and orders, originate with his apparent conclusion that the unanimous opinion of the Supreme Court in Swann has somehow been overruled or eroded." A-9. The district court, in short, did not start out with the aim of achieving desegregation of students. That was a fundamental legal error.[1/]

The only "educational, social and economic cost" of a "Swann-type remedy," Brief, 10-11, discussed by the district court was the hostility of segments of the white community and expense. A-109-113, A-114-116. Bowing to community hostility and cost considerations was fundamental

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1/ Columbus Board of Education v. Penick, 443 U.S. 449, 458-59 (1979); Dayton Board of Education v. Brinkman, 443 U.S. 526, 538 (1979).

legal error.[2/]

2. The United States asserts that the Sixth Circuit barred the district court from considering whether the transportation of students in grades 1-4 "risk[s] the health of the children or significantly impinge[s] on the educational process," Brief, p. 12, quoting Swann, supra, 402 U.S. at 30-31. That claim has no basis in the record. The district court, in reliance on its discussion of white hostility and expense, opted for neighborhood schools

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2/ United States v. Scotland Neck Bd. of Educ., 467 U.S. 484 (1972); Wright v. Council of City of Emporia, 407 U.S. 451 (1972); Monroe v. Board of Com'rs, 391 U.S. 450, 459 (1968); Cooper v. Aaron, 358 U.S. 1 (1957); Brown v. Board of Education, 349 U.S. 294, 300 (1955) (white hostility); Swann, supra, 402 U.S. at 29-31; Davis v. Board of School Com'rs, 402 U.S. 33, 36-38 (1971) (expense not a factor in considering feasibility of student transportation remedy).

for all students in grades 1-4[3/] without conducting any particularized time and distance studies. A-116-117. Subsequent efforts to present evidence about the feasibility of pairing and noncontiguous zoning for most students in the lower grades was precluded. A-136. The court of appeals reversed and specifically ordered the district court to "include these children within a pupil assignment program drafted in compliance with this opinion, except where inclusion would "risk the health of the children or significantly impinge on the educational process' within the meaning of Swann." A-19.

3. The United States asserts that there is a need for "guidance regarding the

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3/ Kindergarten students would attend neighborhood schools under all the plans submitted by the parties.

proper interpretation of Swann." Brief, p. 12. The record, as discussed above, shows that the remand and the instructions of the Sixth Circuit to the district court to apply Swann raise no such question. Even assuming arguendo that a substantial question is presented, certiorari is not appropriate at this juncture of the litigation where the district court has had no opportunity to apply Swann.

Moreover, the very issue in Swann was whether "the pairing and grouping of elementary schools would place an unreasonable burden on the board or the system's pupils." 402 U.S. at 10. The unanimous holding of Swann was that the transportation of students, including students in grades 1-4, was "reasonable, feasible and workable." 402 U.S. at 31. Indeed, in the

companion case, Davis v. Board of School Com'rs, 402 U.S. 33, 38 (1971), the district court's elementary school neighborhood assignment plan was unanimously rejected because, as here, "inadequate consideration was given to the possible use of bus transportation and split zoning." As Chief Justice Burger's opinion put it, neighborhood school zoning "is not the only constitutionally permissible remedy; nor is it per se adequate to meet the remedial responsibilities of local boards." 402 U.S. at 37.[4/]

4/ The United States asserts that the failure of the district court to use a range based on districtwide white and black student enrollment as a "starting point" for middle and high school students was not erroneous because use of a 15% either race minimal quota was nevertheless effective. Brief, pp. 13-14, quoting Swann, supra, 402 U.S. at 25. However, the United States does not and cannot assert that a more effective secondary student remedy cannot

What the government actually seeks is to overrule Swann and Davis, and to have the Court adopt a position against student assignment remedies which the government advanced and this Court rejected more than a decade ago.[5/] Such a course of action is wholly inappropriate in light of the sanction given the transportation remedy scarcely three years ago where, as here, "a constitutional violation of sufficient

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4/ continued

be devised within the guidelines of Swann. That the proposed secondary student enrollment is more effective under the 1971 plan is not determinative because, as the government concedes, the board's implementation of the court's order [of 1971] amount[ed] to a de jure segregation." Brief, p. 12 citing A-45.

5/ The position of the government that the neighborhood schol system "is constitutionally acceptable in desegregating urban schol systems" was originally advanced in its brief in Swann and Davis. Brief for the United States as Amicus Curiae, October Term 1970, Nos. 281, 349, 436, p. 24.

magnitude has been found."[6/] Columbus Board of Education v. Penick, 443 U.S. 449 (1979); Dayton Board of Education v. Brinkman, 443 U.S. 526 (19779). Indeed, the issue presented by the government is the precise issue which the Court declined to reconsider as recently as two years ago. Estes v. Metropolitan Branch, Dallas NAACP, 444 U.S. 437 (1980) (writs of certiorari dismissed as improvidently granted).

6/ Columbus Board of Education v. Penick, 443 U.S. 449, 469 (1979) (Burger, C.J., concurring) ("[O]ur prior decisions have sanctioned [the] use [of student transportation] when a constitutional violation of sufficient magnitude has been found. We cannot retry these sensitive and difficult issues in this Court; we can only set the general legal standards and, within the limits of appellate review, see that they are followed").

Respectfully submitted,

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